No. 141

IN THE

Supreme Court of the United States

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit, in Nos. 5454 and 5470.

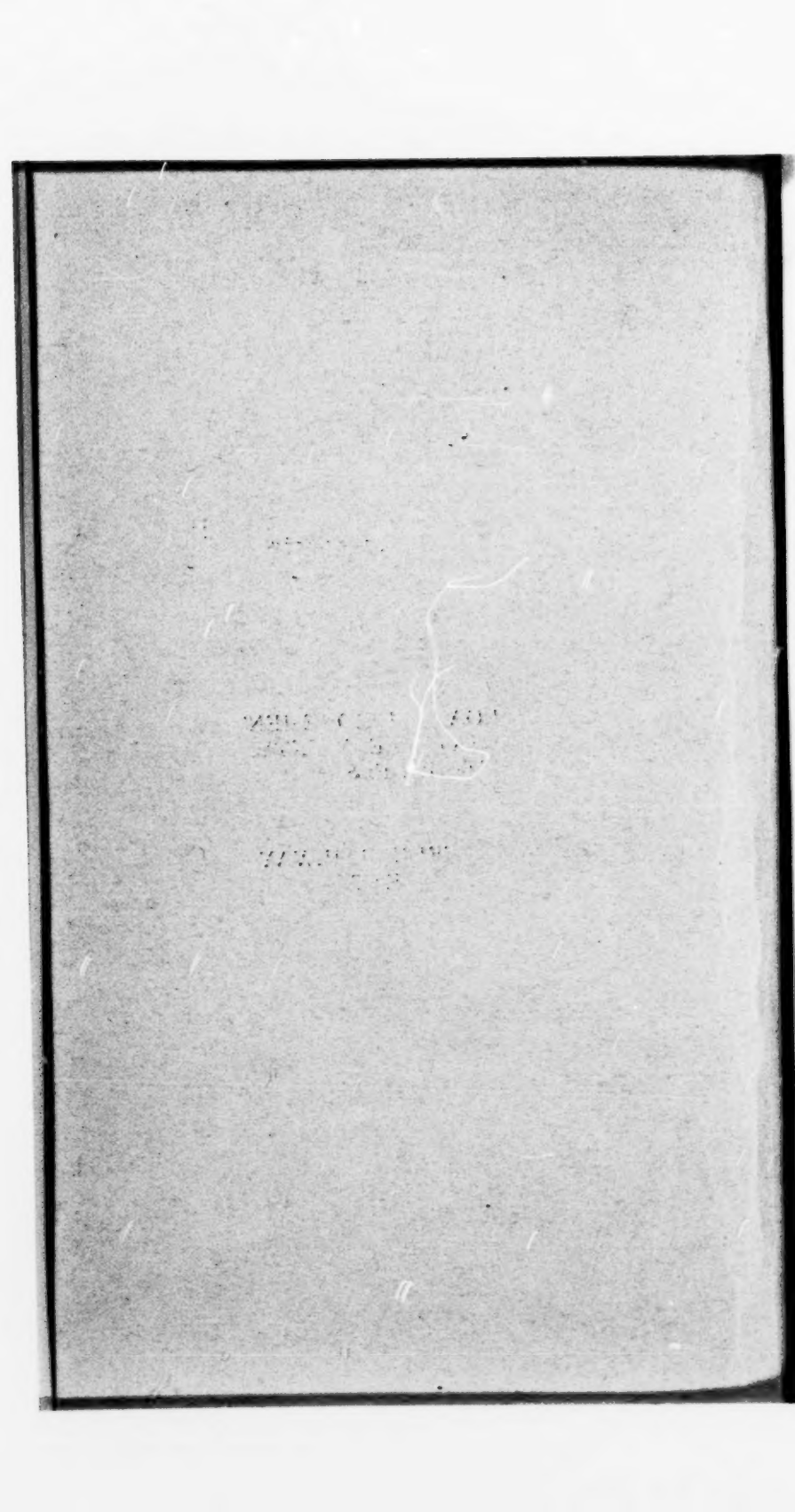
COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 2 OF LAFAYETTE COUNTY, ARKANSAS, PETITIONERS,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

BRIEF FOR PETITIONERS.

HENRY MOORE, JR.,
Attorney for Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas.



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VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

BRIEF FOR PETITIONERS.

To the Supreme Court of the United States of America:

The petition of Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas, for a Writ of Certiorari, directed to the Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court the cases of

No. 5454.

St. Louis Southwestern Railway Company,
Plaintiff in Error,

vs.

Commissioners of Road Improvement District
No. 2 of Lafayette County, Arkansas,
Defendant in Error.

In error to the District Court of the United States
for the Western District of Arkansas.

No. 5470.

Commissioners of Road Improvement District
No. 2 of Lafayette County, Arkansas,
Plaintiff in Error,

vs.

St. Louis Southwestern Railway Company,
Defendant in Error.

In error to the District Court of the United States
for the Western District of Arkansas.

Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas, Petitioners,

vs.

St. Louis Southwestern Railway Company, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Statement of the matter involved and reasons for the allowance of the Writ of Certiorari, the said petitioners respectfully show to the Court as follows:

1. Road Improvement District No. 2 of Lafayette County, Arkansas, hereinafter called the Road District, was formed under the so-called Alexander Act, Act No. 338, passed by the General Assembly of the State of Arkansas during the year 1915. No question is raised as to the validity and legality of the District. In accordance with Section 11 of said Act, the Commissioners appointed to assess benefits accruing from building the road, assessed the respective benefits against the country lands, against the town lots in the Towns of Lewisville, Stamps and Buckner, and against the railroad tracks of the St. Louis Southwestern Railway Company, the party to this action, and also against the Louisiana and Arkansas Railway Company, being the two railroads running through the Road District. As required by said Section 11, the assessments of benefits against the railroad were made at so many dollars per mile of track. The main line of the St. Louis Southwestern Railway Company, hereinafter called the Cotton Belt Railroad runs East and West

through the District approximately parallel to the road, and the Shreveport Branch of the Cotton Belt runs South from the road, being almost at right angles to same. The Louisiana and Arkansas Railway Company runs North and South crossing the road at right angles. The total assessed valuation of all the property within the Road Improvement District is $1,443,000.25. The total assessed benefit for road purposes is $320,825.25. The assessed valuation of the Cotton Belt Railroad within the District is $581,960.00 and the assessment of benefits for road purposes against said Cotton Belt Railroad is $49,606.50. Within the District are 16.94 miles of main line (that running East and West), and 9.21 miles of side track; also 3.5 miles of main line of the Shreveport Branch. The main line of the Cotton Belt is assessed for state and county purposes at $28,500.00 per mile, and the benefits against same at $2000.00 per mile. The side track is assessed at $3000.00 per mile for state and county purposes, and benefits against same at $1000.00 per mile. The Shreveport Branch is assessed for state and county purposes at $18,000.00 per mile, and the benefits against same at $1500.00 per mile (Tr. pages 218-54). The portion of the Louisiana and Arkansas Railway Company within the Improvement District is assessed for state and county purposes at $119,350.00, and the benefits against same for the Road District is $20,080.00. The assessment per mile against the Louisiana and Arkansas Railway Company for the state and county purposes is $12,000.00, and the benefits for road purposes $1,500.00 per mile. The assess-

ments against the side track of the said railway company is $2500.00 per mile, and the benefits for road purposes $1000.00 per mile. The assessed value of the incorporated Towns of Lewisville, Stamps and Buckner for state and county purposes is $383,270.00, and the assessed benefits for the road 15 per cent thereof, $57,490.00. The approximate acreage of country property not including that within the Towns of Lewisville, Stamps and Buckner, is 69,000 acres, and the assessed value of said lands for state and county purposes $364,080.25, and the assessed benefits against the lands for road purposes is $212,103.00 (Tr. page 219).

11. The lands were divided into zones according to their proximity to the improved roads; the lands in the one-mile zone being assessed a benefit for road purposes of $4.00 per acre; within the two-mile zone of $3.00 per acre; and within the three-mile zone $2.00 per acre. A small acreage lying more than three miles from the road, but within the Improvement District was assessed a benefit of $1.00 per acre. In making such assessment of benefits of country property no consideration was given the improvements on the land or the assessed value of the land, whether improved or unimproved, within the respective zones. The assessors stating that in their opinion all of the lands within the respective zones would receive approximately an equal benefit from building of the road, or if any lands received a greater benefit than the other, the wild land, which would be improved and brought on the market because of the road, would receive a greater benefit than the unimproved.

III. The urban property being in town lots or very small acreage, but of a different character from farm property, could not be assessed on an acreage basis, and the benefits accruing to the towns, being of an entirely different character from that to the country lands, the assessors took the valuation on the tax books for state and county purposes, and assessed a flat benefit for road purposes of 15 per cent thereof.

IV. The railroad property, being of still a third character different in its use and kind from either the country property or the city property, was classified separately and assessed as required by Section 11 of the above mentioned Act 338, at a benefit of so many dollars per mile. As noted from the assessments for state and county purposes the main line of the Cotton Belt is two and one-half times as valuable as the main line of the Louisiana and Arkansas Railway Company, and the Shreveport Branch of the Cotton Belt fifty per cent more valuable than that of the said Louisiana and Arkansas Railway Company. The assessors, however, not taking into consideration the value of the roads, but the benefits accruing, placed a benefit of $2000.00 per mile against the trunk line of the Cotton Belt, and a benefit of $1500.00 per mile each against the Louisiana and Arkansas Railway Company and the Shreveport Branch of the Cotton Belt. Against the side tracks of the two roads an equal benefit of $1000.00 per mile was placed. The Louisiana and Arkansas Railway Company accepted the benefit assessment against same as just and made no appeal therefrom. No other owner of property within

the Road Improvement District has protested against or appealed from the assessment of benefits made for road purposes.

V. On the day set for the hearing before the County Court for any protests that might be made against the benefit assessment for road purposes by parties desiring to appeal from the Board of Commissioners to the County Court, which under Section 13 of said Alexander Act sits as a Board of Review from the decision of the Commissioners, the Cotton Belt Railroad filed its petition for removal to the U. S. District Court for the Western District of Arkansas, alleging that this is a controversy in a suit of a special nature pending before a court of competent judicial authority, and that the amount in controversy exceeds the sum of $3000.00, and that the parties thereto are citizens, one of the State of Missouri and the other of the State of Arkansas (Tr. page 50).

Motion was filed by the Road District to remand the cause to the Lafayette County Court, alleging that the U. S. District Court is without jurisdiction to try the matter at controversy in that the proceeding before the County Court is an administrative proceeding, and therefore not cognizable by the Federal Court; and the proceedings of this special assessment do not constitute a suit within the meaning of the Federal judiciary laws, but the County Court is authorized under the so-called Alexander Act (the Road Improvement District Act of the State of Arkansas), to act as a Board of Review in adjusting the amounts of benefits placed by the assessors

against the various lands, town lots and railroad tracks within the Road Improvement District; and in so acting exercises the powers of a Board of Review of Assessors —and does not exercise the powers of a court granted to the County Courts under the Constitution and laws of the State of Arkansas (Tr. page 57).

VI. The authority and jurisdiction of the County Courts is derived from Section 34 of Article 7 of the Constitution of the State of Arkansas.

> "The judge of the county court shall be the judge of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the Circuit Court, or may be hereafter prescribed by law. The regular terms of the court of probate shall be held at the times that may hereafter be prescribed by law."

Under Section 23 of the Schedule of the Constitution of the State of Arkansas,

> "The county courts provided for in this constitution shall be regarded in law as a continuance of the Board of Supervisors now existing by law."

Said Board of Supervisors, the predecessors of the County Court, received their authority from the Legislature under Section 1 of Article 7 of the Constitution of Arkansas of 1868, being as follows:

> "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, and the Supreme Court, Circuit Courts, and such

> other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

After due consideration the motion to remand on behalf of the Road District was by the court overruled, and exceptions to such action on the part of the court duly saved (Tr. page 58).

Out of an abundance of caution in order to preserve this question of jurisdiction a certificate showing that the question of jurisdiction had been raised and a motion to remand filed by the Road District on the ground that this is not a suit within the meaning of the removal statutes, as no appeal is contemplated or allowed by law in a proceeding of this kind, from the County Court of Lafayette County, acting as a Board of Supervisors, to the said U. S. District Court, was presented to the trial judge, who declined to sign same, making a notation on said certificate as follows:

> "The foregoing is presented to the trial judge, and he declined to sign same this the 25th day of June, 1919. Signed Frank A. Youmans." (Tr. pages 269 and 270).

A demurrer was filed to the exceptions of the Railway Company by the Road District, and afterwards when amended exceptions were filed on behalf of the Railway Company (Tr. 59 to 61), said demurrer was re-propounded to the amended exceptions (Tr. 61-62). Said demurrer was by the court overruled and exceptions thereto duly saved by the Road District (Tr. 64-65). The Road District then filed its reply, alleging that

the railroad track within the limits of the road district would be of no value severed from the remaining track running through the States of Texas, Louisiana, Arkansas and Missouri, but that the railroad must be considered as a unit or whole, alleging that great benefit would be received by the railroad company because of the increase in traffic due to the building of the improved gravel road, alleging that the benefit had been assessed against the railroad track and against the buildings without taking into consideration the franchise of the railroad company in making such assessment, and asserting that the railway company is a different sort, kind and character of property from the city property or country lands, and must therefore be assessed by the mile, as it is impracticable to assess same on an acreage or valuation basis (Tr. pages 61-64).

On the 19th day of May, 1919, the above suit came on for trial before the Honorable Frank A. Youmans, Judge for the Western District of Arkansas, who on or about said 19th day of May, 1919, on his own motion, after the introduction of evidence withdrew the cause from the consideration of the jury, and filed his decision to the following effect: He found that the assessment of benefits against the property of the defendant railway company in the country, being that outside of the corporate Towns of Buckner, Stamps and Lewisville should be assessed on an acreage basis, the same as lands within said zone were assessed, to-wit: $4.00 per acre, and the amount of acreage in each mile, the right-of-way being 100 feet in width, being slightly in excess of

12 acres per mile, the court found a total benefit per mile against the Railway Company of $54.00. The total benefit for all of the railroad track outside of said towns as found by the court to be $885.48 (Tr. page 68). To this action of the court the Road District excepted because the kind, character and use of the property was not taken into consideration in making said finding and assessment by the court.

The court further found that the assessment of benefits against the track of the railway company within the corporate limits of the Towns of Lewisville, Stamps and Buckner should be at the same percentage of the actual value of said property including the rail, ties, dump, and all improvements on said property as the assessment of benefits against town lots within said Towns of Lewisville, Stamps and Buckner, and used said basis. After agreement of counsel had been had as to such value, making due deduction so the franchise of the company would not be taken into consideration, the court found a benefit against each mile of railroad within the corporate limits of said towns of $2400.00 per mile, or a total benefit of $9600.00; to said finding and holding of the court the railroad company objected. The total benefit found by the court against all of the track of the Railroad Company within said District was $10,485.48 and to this finding as to the total benefit, both the railroad company and the Road District excepted. The same railroad track being assessed a benefit of $54.00 per mile when in the country and a benefit of

$2400.00 per mile when it crosses the corporate limits of the Towns of Lewisville, Stamps and Buckner.

On or about the 25th day of June, 1919, your petitioners were duly allowed by the said Honorable Frank A. Youmans, District Judge for the Western Division of Arkansas, an appeal from his said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and it was ordered that a certified transcript of the record and all proceedings in said case be forthwith transmitted to the said United States Circuit Court of Appeals.

A certified transcript of the record and of all proceedings in the case was duly transmitted to the said United States Circuit Court of Appeals, and on or about the 7th day of January, 1920, an appeal by your petitioners asking that said decree be reversed came on to be heard, and together with the cross-appeal by the respondent was argued by counsel for all parties before Judges Sandlin, Garland and Van Valkenburgh, and thereafter and on the 29th day of April, 1920, said United States Circuit Court of Appeals rendered and filed an opinion and decision written by Judge Garland, which among other things, held that the assessment of benefits by the County Court of Lafayette County, Arkansas, was in fact a suit at law, and not a mere fixing of the value of property for the purpose of taxation, and sustained the decision of the District Court holding that it had jurisdiction in said cause. Said court held that the District Court was mistaken when it said there was no disputed question of fact in the case, but held

since neither of the parties, or their attorneys of record, filed a stipulation with the Clerk waiving a jury, that since no objection was made to the action of the court in withdrawing the case from the jury, that the mistake of the court in holding there was no disputed question of fact could not be corrected. Said opinion and decision affirmed said decree of said District Court.

The questions of law involved in this case are substantially as follows:

1st. Did the District Court for the Western District of Arkansas have jurisdiction to hear this case, and did the said District Court err in not remanding said cause to the County Court of Lafayette County, Arkansas, as this proceeding is not a "suit" within the meaning of the removal statute, over the objections and exceptions of the Commissioners of Road Improvement District No. 2 made at the time that said motion to remand was overruled? Did the United States Circuit Court of Appeals commit error in sustaining the jurisdiction assumed by said District Court?

2nd. Did the United States Circuit Court of Appeals commit error in not reversing the cause in a trial upon its merits after finding that the District Court was mistaken and erred in withdrawing said cause from the jury on its own motion, and in holding there was no disputed question of fact in the case?

All of said questions were duly raised and argued by your petitioners in the said District Court and in said Circuit Court of Appeals, and in said Circuit Court

of Appeals a petition for rehearing was presented raising the questions above, which petition for rehearing was overruled by said Circuit Court of Appeals.

Concerning the question of jurisdiction, Judge Garland said in his opinion, which is reported in Volume . . , of the Federal Reporter, at page . . . .

> "We are of the opinion that a proceeding which might result in a judgment against the defendant for the payment of money is a suit at law, and the assessment of benefits in such a proceeding is an assessment in the same way that a jury assesses damages in a civil action at law upon a breach of contract or any other contested liability, and not a mere fixing of the value of property for the purpose of taxation."

On the question as to the error of the court in withdrawing the case from the jury said Judge held,

> "In the case at bar neither the parties, nor their attorneys of record filed a stipulation in writing with the Clerk waiving a jury, but the court of its own motion withdrew the case from the jury, and each party without objection to such action of the court presented findings of fact and conclusions of law to the court for its approval. The case, therefore, stands as a civil case at law, tried by the court without any waiver of the jury, as the law provides. Where this is so and the facts are not admitted in a case stated, we have no jurisdiction to review any question on a writ of error, except those which arise in the process, pleading or judgment, and no such question appears. In order that our decision on this question may not be misunderstood, we remark that the trial of the court was mistaken when it said there was no disputed question of fact in the case."

VII. In the case of *Upshur County* v. *Reisch*, 135 U. S., page 467, the Supreme Court in considering a similiar case transferred from the County Court of West Virginia held,

> "Is an appeal from an assessment of property for taxation a suit within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the states, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of assessors, or appeal, or whatever called, it is not usually a court, nor is the proceeding a suit between the parties. It is a matter of administration and the duties of the tribunal are administrative and not judicial in the ordinary sense of the term, though often involving the exercise of *quasi* judicial function. Such appeals are not embraced in the Removal Act. It is true that the tribunal or appeal is called the county court, but it has no judicial powers except in matters of probate; in all other matters it is an administrative board, charged with the management of county affairs."
>
> "The original assessment made by the county assessors could not be called a suit, and could not be removed, and there is justly no more reason for placing an assessment on appeal within that category, and it is nothing but an assessment; in either case, it is an administrative act; the fact that the board of appeal may swear witnesses, does not make the proceeding a suit." *Upshur Co.* v. *Reisch*, 135 U. S. p 467.

In the case of *M. P. Railway Company* v. *Izard County Highway Improvement District*, Southwestern Reporter, Volume 220, page 452, the Supreme Court of the State of Arkansas, where the identical question at

issue was presented held that the action of the county court in reviewing and confirming benefits assessed against land within the Road Improvement District was not a judicial but an administrative function, and after citing the case above quoted of *Upshur County* v. *Reisch*, held that such assessment was not a "suit" within the meaning of the law authorizing the removal of cases from a state to a federal court.

In a latter case, *Monette Road Improvement District* v. *Dudley*, Supreme Court Reporter, Volume 3, page 473, the Supreme Court of Arkansas affirmed the decision above.

Your petitioners further aver that the present case is one in which it is proper for this court to issue a Writ of Certiorari for the following reasons:

1st. Because the United States Circuit Court of Appeals for the Eighth Circuit has declined to follow the decision of this court as set forth in *Upshur County* v. *Reisch*.

2nd. Because the public interest and the interest of jurisprudence requires that the decision of this court upon the question of jurisdiction involved herein be made definite and certain. Since several hundred road districts have been formed in Arkansas under the Act in question (Alexander Act), or by special Acts, it is, therefore, a matter of vital interest to the entire State that this question of jurisdiction be definitely settled.

3rd. Because there is a conflict in this respect between the law as expounded by said Circuit Court of

Appeals and the decisions in the Supreme Court for the State of Arkansas, situate in the same district and circuit.

4th. Because the Circuit Court of Appeals failed to take into consideration Section 1246, as follows:

> "New Trials—All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.
>
> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the rights of the parties (40 Stat. 1181)" (1919 Supplement to U. S. Compiled Statutes, Annotated, West Publishing Co., p. 273).

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Circuit Court of Appeals for the Eighth Circuit to bring up this case to this Honorable Court for such proceeding therein as to this Honorable Court may seem just.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 OF LAFAYETTE COUNTY, ARKANSAS,

By H. A. McCANTS, *President.*

Attest: J. M. HUDGINS, *Secty.*

HENRY MOORE, JR.,
Attorney for Petitioners.

State of Arkansas, Western District, Texarkana Division.

H. A. McCants, being duly sworn, says:

I am President of the Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas; I have read the foregoing petition, and the same is true to my own knowledge, information and belief. My knowledge is derived from the records in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

H. A. McCANTS.

Attest: J. M. HUDGINS, *Secty.*

Subscribed and sworn to before me this 4th day of September, A. D. 1920.

BROOKS MONTGOMERY,
Notary Public, Lafayette County, Arkansas.

(Seal)

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded, and that this case is one in which the prayer of the petitioners should be granted by this court.

HENRY MOORE, JR.,
Counsel for Petitioners.

ASSIGNMENT OF ERRORS.

1st. The United States District Court and the Circuit Court of Appeals for the Eighth Circuit were without jurisdiction to hear this case, and the motion on behalf of the petitioner to remand this cause to the County Court of LaFayette County, Arkansas should have been granted, as said case is not a suit within the meaning of the Federal Statutes.

2nd. Because the Circuit Court of Appeals failed to take into consideration Section 1246 of the Revised Statutes, and failed to grant a new trial after deciding that the United States District Judge was in error in holding that there was no question of fact involved, when in accordance with said section this cause should have been remanded for a trial of said questions of fact by the jury.

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Under Section 11 of Act 338 of the Acts of Arkansas, for the year 1915, the road law called the Alexander law, the assessors appointed to assess the benefits shall inscribe in a book in appropriate columns the name of the owner of the property, the assessed value and assessed benefits, assessing the railroad benefits by the mile. Under Section 12, said assessors shall assess in said book the damages, if any, accruing to the real property. Then follow Sections 13 and 14, being the sections of the Act under consideration in this cause, same being quoted below, to-wit:

> "Section 13. As soon as the assessors have completed the work of assessment for the district, they shall certify to same and deliver it to the board of commissioners. The commissioners shall immediately file same in the office of the county clerk, and the county clerk of said county shall give public notice by two consecutive insertions in a publication having a general circulation in said county. Said notice shall give a description of all lands embraced in said district in the largest subdivision practicable and shall state that said assessment of benefits and damages has been filed in said office and shall call upon any person, firm or corporation aggrieved by reason of any assessment to appear before the County Court on some date to be fixed by the court, not less than five days after the last insertion therein, for the purpose of having any errors adjusted, or any wrongful or grievous as-

sessment corrected, and all grievances or objections to said assessment shall be presented to said court in writing. Any person who is damaged by reason of said improvement may appear before said court at the same time, for the purpose of having the assessment of damages adjusted.

The County Court shall hear and determine the justness of any assessment of benefits, or damages, and is hereby authorized to equalize, lower or raise any assessment upon a proper showing to the court.

Section 14. At the hearing provided for in the preceding section, and after the County Court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the County Court shall have all the force and effect of a judgment against any real property in said district, and it shall be deemed final, conclusive, binding and incontestible except by direct attack on appeal.

Any owner of real property within the district may appeal from the judgment fixing the assessment of benefits or damages within ten days by filing an affidavit for appeal and stating therein the special matter appealed from, but such appeal shall affect only the particular tract of land or other real property concerning which said appeal is taken, and on appeal only the special matters set up in said affidavit shall be considered by the Circuit Court.

If no appeal is taken within that time, judgment shall be deemed final, conclusive and binding upon all real property in the district, and the owners thereof, and said assessment of benefits shall not be subject to collateral attack.

The board of commissioners on behalf of the district or any owner of real property therein, may

likewise appeal from any order of the County Court refusing to enter such judgment, and said County Court may be compelled by mandamus to enter such judgment."

This proceeding is not a suit within the meaning of the Federal Removal Acts. The County Court, in passing upon the benefits received from the building of the road under the sections above quoted, was acting in an administrative and not a judicial capacity. Said County Court, occupying the position and having the same authority as that of the Board of Supervisors under the Constitution of Arkansas, of 1868.

The authority and jurisdiction of the County Courts is derived from Section 34 of Article 7 of the Constitution of the State of Arkansas.

> "The judge of the County Court shall be the judge of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the Circuit Court, or may be hereafter prescribed by law. The regular terms of the court of probate shall be held at the times that may hereafter be prescribed by law."

Under Section 23 of the Schedule of the Constitution of the State of Arkansas,

> "The county courts provided for in this constitution shall be regarded in law as a continuance of the Board of Supervisors now existing by law."

Said Board of Supervisors, the predecessors of the County Court, received their authority from the Legislature

under Section 1 of Article 7 of the Constitution of Arkansas of 1868, being as follows:

> "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, and the Supreme Court, Circuit Courts, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Since the decision of this cause by the lower court, the Arkansas Supreme Court has definitely decided, in *Horne* v. *Baker*, opinion dated October 13, 1919, that in approving the plans and in determining finally the benefits received from the building of the road, the County Court is acting in its administrative rather than its judicial capacity. Said decision is to the effect that an appeal may be taken to the Circuit Court from such administrative decisions, but it is definitely and finally settled there that such decisions as the one at issue in the present cause are administrative. Said decision also refers to Schedule 23 of the Constitution of 1874, where the county courts were made successors and a mere continuance of the former board of supervisors of the counties, and thus given exclusive, original control over internal improvements within their counties.

> "There is nothing in the act referred to, however, which indicates that the County Court was to act in this instance in any manner other than as it ordinarily acts in the disposition of administrative matters over which it is given jurisdiction by the constitution. * * * The statute probably did not contemplate the allowance of an appeal in this class of cases, for the legislation is borrowed from states where acts prescribed to be performed by the

> County Court are administrative purely, and where no appeal is allowed, but the right to appeal has been found elsewhere, and is established by the decisions of this court. * * * Under authority of Section 33, Art. 7, of the Constitution of the State of Arkansas, appeals have been uniformly granted as a matter of constitutional right from all judgments of the County Court, and no distinction has been made between administrative matters and judicial causes." *Horne v. Baker*, Ark. Supreme Court Reporter, date October 18, 1919.

From the above, it is clearly established that the County Court in performing the duties prescribed by the sections of the constitution above cited, acted under the authority of the legislature, as a board of review, and not in its judicial capacity. This identical question came before the United States District Court in Chicago, and said court held that the County Court, under authority granted by the legislature, was acting in a legislative or administrative capacity, and therefore the action was not a *suit* within the meaning of the Federal Removal Act, and the Federal Court was without jurisdiction.

In Re City of Chicago, 64 Fed. page 897.

In two later cases the above mentioned decision was referred to and upheld. However, the cases were not remanded, since under the specific authority of the constitution creating the County Court in one instance, and under the decisions of the Supreme Court of the state in the other instance, the county courts could not act in any other than judicial capacity.

C. M. & St. P. Ry. Co., 198 Fed. page 253.
In Re Mississippi Power Co., 241 Fed. page 194.

There is also the recent case of *Smith v. Douglas County, Nebraska*, 254 Fed. page 246, decided by the Court of Appeals of the Eighth Circuit, and on which decision the opinion of the District Court seems to have been based. Attention is called, however, to the fact that the County Court was given authority to determine all questions in relation to taxes, not being confined, as in the present case, to merely determining the amount of such taxes or benefits. Further, as in the cases above cited, the county courts in Nebraska, under the constitution, are given certain original jurisdiction and such other jurisdiction as may be given by statute (see page 246, 254 Fed. Rep.).

This clearly differentiates said decision, and the decisions in other states having only judicial authority from the present cause arising under the laws and Constitution of Arkansas, where the County Court exercises both judicial and administrative powers. The assessment of benefits in the instant case is a local assessment and not a tax in the sense in which these words are used in the Constitution of Arkansas, and since the County Court, as a court under the constitution, has no authority over local assessment or over taxes, save county taxes, the legislature could not give the court jurisdiction in a judicial capacity to determine the amount of benefits received by lands within the road district.

> "The local assessment necessary for the proper execution of the act (creating a ditch improvement district) in any given locality, are not taxation in the sense in which that term is used in Sec-

> tion 2, Art. 23 of the Constitution, as has been often held by this court." *Cribbs* v. *Benedict*, 64 Ark. p. 562.

In the Missouri case, strongly relied upon by the railway company, under Section 36 of Art. 6 of the Missouri Constitution, the County Court has jurisdiction to transact all county business, and all other business such as may be prescribed by law. Said County Court of Missouri, therefore, can only act in a judicial capacity, having no authority as an administrative body, as is the case in Arkansas. 191 Fed. page 259.

In the Iowa case, relied upon, under the decision of the Supreme Court of Iowa, only judicial functions may be exercised by the County Court.

> "but powers that are not to be exercised in the discharge of the functions of the judicial department cannot be conferred on the courts, or changes designated by the constitution as part of the judicial department of the state." *State* v. *Barker*, 116 Iowa, page 96, quoted in 241 Fed. Rep. p. 198.

And in Smith vs. Douglas County, the Nebraska case, the county courts are given, not administrative, but such judicial, jurisdiction as may be granted by statute. 254 Fed. Rep. page 246.

A careful reading of the above cases shows that they fully sustain the case heretofore cited, *In Re* City of Chicago, the distinction being that county courts in the last three cases cannot exercise administratve powers, whereas in the Chicago case and in Arkansas, the county courts' functions are largely occupied in administrative rather than judicial actions.

The question at issue has been finally and definitely settled by the decision of the Supreme Court of the United States in *Upshur County* v. *Reisch*, 135 U. S. page 467, arising in the State of West Virginia, and in which state the County Court, just as in Arkansas, exercises administrative as well as judicial functions. In said case the United States Supreme Court decided that the Federal Court could not take jurisdiction over the exercising of such administrative or judicial functions, and that the cause not being a suit within the Federal Removal Act, same was remanded to the County Court. Practically the same question was at issue in the Upshur case, as in the present, it being not the right to tax property, but the amount of such taxes that could justly be laid against the property. The Supreme Court held:

> "Is an appeal from an assessment of property for taxation a *suit* within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the states, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of assessors, or appeal, or whatever called, it is not usually a court, nor is the proceeding a suit between the parties. It is a matter of administration and the duties of the tribunal are administrative and not judicial in the ordinary sense of the term though often involving the exercise of *quasi* judicial function. Such appeals are not embraced in the Removal Act. It is true that the tribunal or appeal is called the county court, but it has no judicial powers except in matters of probate; in all other matters it is an administrative board, charged with the management of county affairs."

> "The original assessment made by the county assessors could not be called a suit, and could not be removed, and there is justly no more reason for placing an assessment on appeal within that category, and it is nothing but an assessment; in either case, it is an administrative act; the fact that the board of appeal may swear witnesses, does not make the proceeding a suit." *Upshur Co. v. Reisch*, 135 U. S. p. 467.

The County Court, acting as the board of appeal, from the decision of the assessors, as in the Upshur case, above cited, had no judicial powers, and the District Court erred in not remanding this cause to the County Court because of its lack of jurisdiction.

It was held in *ex parte Wisner*, 203 U. S. page 449, that the consent of parties could not give jurisdiction to the Federal Courts where such jurisdiction did not exist by law. This holding however, seems to have been changed in *In Re Moore*, 209 U. S. page 490, and in the case of *In Re Winn*, 213 U. S. page 458, it being held that consent of parties could confer jurisdiction where the Federal Court had no jurisdiction of the controversy, originally, or by removal. In a later case, *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. page 249, where it appeared no motion was made to remand, the court held that jurisdicton was obtained by consent of the parties. In this case a motion to remand having been filed in apt time, the District Court and this court has no jurisdiction unless the cause of action is a suit of a civil nature, and one of which this court could not originally have taken jurisdiction.

Unless the assessors for the Road District could have originally filed its report in the United States District Court, and asked said court to raise or lower the various assessments, and exercise the authority given by statute to the County Court in its administrative capacity, then this cause could not be properly transferred from the County Court to the United States District Court, since the jurisdiction of the United States Courts on removal is limited to such suits as might have been brought originally in said courts. The case referred to by the railroad, *Madisonville Traction Co. v. St. Bernard Mining Company*, 196 U. S. page 239, is not in contravention of the claim of the Road District on the question of jurisdiction, since such case only holds that an action for condemnation is such a suit that it may be transferred to the Federal Courts, and could have originally been brought in the Federal Courts. Under Section 1010 of the Act of January 20, 1914, the authority is granted for the removal of cases from a state to a U. S. District Court, the authority being the same as that granted by the Act of 1887, which restored the rule of 1789, the expressed intention of the act being, as stated in *Cochran v. Montgomery County*, 199 U. S. page 60, to restrict the jurisdiction of the Federal Court, and that this was accomplished largely by withholding the right or removal from state to Federal Courts. The court further held:

> "Such cases were only liable to removal from a state to the Circuit Court as might, under the law, or in all events under the constitution, have been brought before the Circuit Court by original pro-

> cess. * * * The Act of 1887 restored the rule of 1789, and as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction."
>
> *Cochran* v. *Montgomery County*, 199 U. S. page 260.

It was also stated, *In Re Winn*:

> "It is well settled that no case can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the lower court."
>
> 213 U. S. page 458.

The same question was referred to as one well settled, and not needing argument, by Judge Rogers, as organ of the Circuit Court of Appeals of the Eighth Circuit, as follows:

> "The jurisdiction of the United States Circuit Court on removal by the defendant from a state court is limited to such suits as might have originally been brought in the United States Circuit Court by the plaintiff in the first section of that act."
>
> *Wall* v. *Franz*, 100 Fed. Rep. page 681.

This was a proceeding for the probate of a will in Arkansas, and the attempt was made to transfer the case to the Federal Court. Since the Probate Court and the County Court, under the section of the Arkansas Constitution, above quoted, have the same powers, this decision is peculiarly applicable as setting forth the duties and jurisdiction of the county and probate courts in Arkansas. As there stated by Judge Rogers, in referring to the question of jurisdiction:

> "It must be remembered that the question is not whether Congress has the power under the constitution to confer jurisdiction upon Federal Courts, but the question is, has it been done, and the action of the courts from the foundation of the government down to the passage of the Act of 1888, could be accepted as an absolute denial thereof, and unless it can be shown that by the Act of 1888 the jurisdiction in respect to the subject-matter under consideration was acknowledged, the court should await further action upon the part of Congress before assuming jurisdiction of this new and novel class of cases heretofore confined in England to ecclesiastical courts, and to this country to statutory courts adopted especially for their hearing."
>
> 100 Fed. Rep. C. C. A. page 681.

A state constitution may delegate to its courts either judicial powers alone or judicial, administrative and legislative powers, and although cases may be transferred from state to Federal Courts where judicial power is brought into question, such transfer may not be had where the powers are either legislative or administrative.

The State Corporation Commission of Virginia, by the constitution of the state, was given a dignity and importance that added judicial to its other functions, and was for some purposes a court within the commonly accepted meaning of that word. However, when an attempt was made to transfer a proceeding from said Corporation Commission to the Federal Courts, this right was denied by the Supreme Court where the legislative functions were at issue.

"Proceedings legislative in nature are not proceedings in court within the meaning of the statute, no matter what may be the general or dominating character of the body in which they may take place. * * * That question depends, not upon the character of the body, but upon the character of the proceedings."

Citing decisions.

"And it does not matter what inquiries may have been made as a preliminary of the legislative act, most legislation is preceded by hearings and investigations, but the effect of the inquiry and of the decision upon which, is determined by the nature of the act to which the inquiry and decision led up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. *Prentiss* v. *Atlanta Coast Line Co.*, 221 U. S. page 226, 53 L. E., page 159."

This decision squarely supports the Upshur case, heretofore cited, holding that causes other than judicial ones cannot be transferred to the Federal Court, and further holding that the same person or body of men may in certain instances be a court exercising judicial authority, and in other cases have purely administrative or legislative powers granted under the constitution and law of the state.

Hundreds of road districts have been organized under the Alexander law, the one here under consideration. The Legislature of Arkansas, during the year 1919, at its regular and special term, passed probably two hundred and fifty special road acts. If there exists the right to transfer each assessment of benefits amounting to more

than $3,000 where the land owner is a non-resident, for decision from the County Court to the Federal Courts, then the wheels of justice may well be clogged with such administrative matters, and the courts unable to attend to their judiciary functions, if such transfers are to be allowed. Under the decisions above cited it is most earnestly contended that this cause could not have originally been brought in the United States District Court, and that such court is therefore without jurisdiction to consider same, and that this cause must be remanded to the County Court of Lafayette County, Arkansas.

The Supreme Court of the United States, in *Upshur County* v. *Rich*, 135 U. S. page 467, a case almost identically on all fours with the present one, uses the following language:

> "But is an appeal from an assessment of property for taxation a suit within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the states, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a Board of Commissioners of Appeal; sometimes one thing and sometimes another. But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative and not judicial in the ordinary sense of that term, though often involving the exercise of *quasi* judicial functions. Such appeals are not embraced in the removal Act."

The courts of the United States follow the decisions of the courts of final resort in the several states in the matter of the construction of statutes, etc., of such states.

The Supreme Court of the State of Arkansas since the present case was decided in *M. & P. Ry. Co.* v. *Izard County Highway Imp. District* (S. W. Rep. Vol. 220 No. 3, May 26, 1920, p. 452), wherein the identical question as to whether or not such a proceeding as that involved in the present case before this Honorable Court, was a *suit* within the meaning of the law authorizing the removal of causes from a state court to a federal court, was at issue, held that an owner of land objecting to Road Improvement District Assessments, on hearing before the County Court was not entitled to a removal of the cause to the United States District Court under the Federal Statute; such hearing being held not to be a judicial proceeding within the jurisdiction of the County Court when exercising the strict judicial functions conferred upon it by the Constitution, and that assessments for local improvements by the Legislature or its duly appointed agents, the Commissioners and the County Courts are not in any sense judicial proceedings within the jurisdiction of the County Court when exercising the strictly judicial functions conferred upon it by the Constitution of the State of Arkansas.

The Arkansas Supreme Court in this case cites the case of *Upshur County* v. *Rich* (*supra*), which arose upon a statute of West Virginia, and says:

"The jurisdiction of the County Court under the Constitution of West Virginia, when the above decision was rendered was substantially the same as that conferred upon the County Court under our Constitution so far as Roads and the internal affairs of the county are involved. We conclude, therefore, that the assessment of the commissioners and the proceedings thereafter in the County Court were in no sense a suit in law or equity, within the purview of the Federal Judicial Code."

The Supreme Court of Arkansas in a very recently decided case (May 24, 1920), *Monette Road Imp. Dist. v. Dudley*, Circuit Judge, S. W. Reporter, Vol. 222, No. 1, page 59 affirmed its holding in *M. & P. Ry. Co. v. Izard County Highway Imp. Dist. (supra)*.

The Monette Road Imp. Dist. was formed for the purpose of improving certain roads in Craighead County, and said district in this case made application to the Supreme Court of Arkansas for a writ of prohibition directed to the judge of the Circuit Court of Craighead County to prevent said Circuit Court from hearing and determining proceedings involving the validity of the acts of the Commissioners of said District in assessing certain benefits and in attempting to construct the improvement. In deciding the case the Supreme Court says:

"The real question in the case is whether or not the Circuit Court had juridiction to grant the relief sought in the complaint.

The functions of the Board of Assessors in assessing benefits, and the Board of Commissioners in adjusting them on complaint of the property

owners is not judicial in the ordinary sense, but, it is in the nature of a Legislative power.

Boards created as special tribunals for certain purposes may, and sometimes do, act in a judicial or quasi-judicial capacity, and when so acting their proceedings may be reviewed on certiorari, but in the matter now before us, the commissioners do not act in such capacity. (Citing various authorities including the Izard Company Highway Imp. Dist Case) * * *

The writ of prohibition is therefore awarded in accordance with the prayer of the petitioner to prevent the Circuit Court from further proceeding in the matters under consideration."

In re City of Chicago, 64 Fed. Rep. p. 897, the Circuit Court for the Northern Div. of Ill., held that assessment proceedings for municipal improvement were an exercise of the taxing power, and an administrative act, and did not constitute a "suit" within the provisions for removal of suits to Federal Courts, though they are conducted under judicial forms by a court of general judicial powers.

This was a case where the City of Chicago moved to remand to the County Court of Cook County, a special assessment proceeding for putting in a sewer, which case had been removed to the Federal Court on petition. In a carefully considered opinion, the court, by Judge Seaman, following the decision of the United States Supreme Court in *Upshur County* v. *Rich* (*supra*), ordered that said remand be made.

We note that a decision upon the question, in such cases as this, as to what constitutes *a suit* within the pro-

visions for removal of suits to Federal Courts, depends very largely upon the language of the statutes of the state under consideration in each of such suits, and we respectfully submit that there is nothing in the cases referred to by the Circuit Court of Appeals as sustaining the ruling of the court below, that in any manner does away with the opinion of the Supreme Court of the United States in *Upshur County* v. *Rich*, 135 U. S., hereinbefore referred to. It is shown in the opinion in this case, rendered by Justice Bradley (for a unanimous court) that every decision of the U. S. Supreme Court referred to on this point by the Circuit Court of Appeals as sustaining the ruling of the court below (except 196 U. S. 239), was considered by the court in arriving at the opinion rendered; reference being made particularly to said cases by the court, and after considering same the court unanimously held that such a proceeding for an assessment of property for taxation is not a suit within the meaning of the law authorizing the removal of causes from a state to a federal court. All of said cases so referred to were decided prior to the decision in *Upshur County* v. *Rich*, except the case of *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239.

This last mentioned case arose under a Kentucky statute in a proceeding for the taking of land by eminent domain, and the question at issue under the Kentucky statute being construed, was the amount of damages which the owner of the land being condemned, was entitled to, and for which amount the statute provided for a judgment to be rendered, and this case cannot be re-

lied upon as conflicting with the opinion in *Upshur County* v. *Rich*, or as controlling in the present case where it is found that the Arkansas statute is in all "essential particulars for the purpose of this discussion" similar to the statute of West Virginia, construed by the Supreme Court of the United States, and held not to justify the removal of said proceedings to the Federal Court.

And so we beg to suggest that a reference to the various cases in federal reporters will show that the decisions therein depend upon the wording of the statutes and constitutions of the various states wherein these cases arose, and that no such decision referred to should be controlling so as to overturn the decision of the Supreme Court in *Upshur County* v. *Rich*.

The case of *Smith* v. *Douglass County*, 254 Fed. 244, was a proceeding in a matter of an assessment of inheritance taxes against real and personal property under a Nebraska statute, against the property of a decedent, which property was claimed by another, as surviving joint tenant, so that the proceeding was a contest *inter partes* between the two claimants and under the Nebraska Constitution, the court properly held that it was a suit within the removal statutes.

In re Jarnecke, 69 Fed. 161. It was held that under the Indiana statute prescribing proceedings for the establishment of drains and assessing the benefits and damages thereof, the cause was removable to the Federal Court. But an examination of the opinion shows that it was the particular nature of the proceedings under the

Indiana statutes that differentiates said case from the principle announced in *Upshur County* v. *Rich*; and the court in discussing said statute and the proceedings thereunder, says:

> "The proceeding does not involve the mere exercise of the taxing power of the state. It is in the nature of the exercise of the power of eminent domain, and contemplates the taking of land whereon to construct the drain, as, well as the assessments of benefits on the remaining lands, whereby to pay for its establishment and construction. In this particular it differs from a proceeding solely for the purpose of raising money by the exercise of the taxing power to aid in the construction of a public improvement. This differentiates the present case from that of *In re City of Chicago*, 64 Fed. 897, and other cases of like character, which holds that a proceeding solely for the purpose of raising money by the exercise of the taxing power for the construction of a public improvement is not a suit, although such proceedings may be conducted in a court of general jurisdiction."

The case of *In re Stutsman County*, 88 Fed. 337, was a proceeding for the collection of delinquent taxes provided for by the laws of North Dakota. The District Judge (Amidon), in his opinion recognizes the binding force of the opinion in *Upshur County* v. *Rich*, (*supra*), and shows that under the terms defined by the Supreme Court of the United States the proceeding under consideration has every element of a suit. And the court shows that "it has been expressly held by the Supreme Court of Minnesota, (from the statute of which, the North Dakota law was taken) and North Dakota, that

the proceedings under this statute is a *suit*, and the same conclusive force is given to a judgment entered therein as to judgments and decrees in actions at law and suits in equity."

The case of *Terre Haute* v. *Railway*, 106 Fed. 545, was remanded to the state court on account of want of the requisite diversity of citizenship, but for which the cause might have been removed. In holding that but for the lack of diverse citizenship, the cause might have been removed, the court held this upon a construction of the Indiana statute providing for the appropriating of real estate for the opening of streets, in which it is set forth that the questions of benefits or damages are "issues of law and fact" that "may be formed, tried, and determined as in other actions at law."

There is nothing in the case to sustain the removal of the cause at present under consideration by this Honorable Court.

In the case of *Drainage District No. 19* v. *Ry. Company*, 198 Fed. 253, the decision of the District Court for the Western District of Missouri overruling the motion to remand to the state court, is based upon the wording of the constitution and statutes of the State of Missouri. The court holding that the proceedings were a suit in the county court vested by Art. 6, paragraphs 1 and 36 of the Missouri Constitution with judicial powers and we submit that there is nothing whatever in said opinion to uphold the order of removal in the cause under consideration. The court in the commencement of its

opinion notes that similar questions in the Federal Courts have been variously decided according to the facts and the local laws specifically involved, and says: "This case must be determined upon its own facts and the special statute under which it arises."

In the case, *In re Mississippi Power Company*, 241 Fed. 194, decided by the District Court of Iowa, next referred to by the Circuit Court of Appeals, the motion to remand was overruled, but here again the order of the Federal District Court was made after the cause had by appeal, provided for in the statute, reached the District Court of the State, and it is clearly shown in the opinion that the removal could not have been made simply upon the assessment proceedings. The following is a quotation from the District Judge's opinion:

> "(1) Of course, the assessment and levy of taxes is legislative in its character, or, as it is sometimes expressed, it is administrative; but it is an exercise of the legislative power.
>
> The legislature has the power to designate the tribunal which shall make assessments upon property. It may confer this power upon a judicial or a non-judicial body, and the owner of property assessed, cannot claim that he has been deprived of, 'due process of law,' because the legislature does not permit him to have a hearing in court. So that the Legislature of Iowa had the power to prescribe a method of assessment, and levy and collection, of taxes, without providing for any hearing before any court.
>
> (2) It is the contention of appellant that by the appeal provided for, the District Court of the state is simply made part of the 'machinery' by

> which, and through which the taxing power of the state is exercised. It is insisted that the action of the court in reviewing upon appeal, the action of the board of review is administrative rather than judicial. If this be true, then this proceeding is not a suit within the Removal Act.
>
> But at the outset, we are confronted with the fact that the District Court of Iowa is a constitutional court, possessed of no administrative powers or functions, and the Supreme Court of Iowa has specifically held that non-judicial powers cannot be conferred upon the District Court by the Legislature."

In the case of *C. M. & St. Paul Ry. Co.* v. *District No.* 8, 253 Fed. 491, the remaining case referred to by the Circuit Court of Appeals in support of the refusal to remand the case at bar, the same District Judge rendered the opinion as in the next preceding case hereinabove cited, and it appears that this case had been passed upon by the district judge (Wade, J.) prior to the submission of the case *In re Mississippi Power Co.* (*supra*), and Judge Wade had sustained the motion to remand to the State Court.

In a supplemental opinion rendered after a decision made in the Mississippi Power Company case, Judge Wade upon a further study having been made of the Iowa Statutes, overruled his order to remand and held that under the Iowa Statutes the case was removable; but in this opinion there is nothing to sustain a refusal to remand the case at bar. In speaking of the Iowa Statutes under consideration and the railway company as a party to the suit, the court says:

> "It proceeds in the only way authorized by the Legislature. There was no *suit* possible until it had perfected its appeal, but instantly the appeal was perfected there was a *suit*, and in the spirit of the law I believe that it ought to have and I believe that it has the right to remove the case for trial."

In *City of Toccoa* v. *Marchbanks*, 261 Fed. 684, in a condemnation proceeding under the Civ. Code of Georgia, the District Court N. D. Georgia, held upon a construction of the Georgia Statutes giving the right of appeal to the Superior Court of the County, the City of Toccoa had the right to transfer the cause to the Federal Court, but held further that, in accordance with the Georgia Statutes, the time for filing a petition for removal was limited to the 10 days allowed for entering appeal, which 10 days having expired, said cause was remanded, showing how closely the state statutes are followed in deciding questions of this character.

In *M. P. Ry. Co.* v. *Izard County Highway Improvement District, supra*, the Supreme Court of Arkansas held an assessment of benefits is not a "suit," and that the decisions of the County Court are administrative and not judicial. Said case is on all fours with the present one, and since the Federal courts will follow the decisions of the court of last resort of a state in construing its own constitution and statutes, this case should be remanded to the LaFayette County Court, as the United States Courts are without jurisdiction.

To sustain the second ground alleged in the petition for writ of certiorari, to-wit: That the Circuit Court of

Appeals erred in holding that it had no jurisdiction to review the action of the Trial Court, though it had found that the Trial Court had committed error in saying there was no disputed question of fact in the case, and in withdrawing the issues from the consideration of the jury, we beg to refer the court to Section 1246 (Jud. Code, Section *269*, as amended, Act Feb. *26*, 1919, c. 48), reading as follows:

> "New Trials.—All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.
>
> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the rights of the parties (40 Stat. 1181)" (1919 Supplement to U. S. Complied Statutes, Annotated, West Publishing Co. p. *273*).

We respectfully submit that the statute just quoted was made to meet and remedy just such a situation as confronts the court in this cause. It is true that no exceptions were saved to the action of the court in withdrawing this case from the jury, but certainly this failure is covered and cured by the express provisions of the statute quoted. This statute was intended by Congress to be remedial and to obviate all technical errors to the end that every case might be decided upon its merits without regard to such technical errors, defects, or failure to accept, unless such failure materially affected the

rights of the other party. Certainly the rights of the other party can be preserved and will not be injuriously affected by the court considering this case upon its merits, and since both parties to the action appealed from the judgment of the lower court, we respectfully submit that this court should now, in view of the statute quoted, reverse the case so same may be decided upon its merits.

For the reasons as above set forth and under the decisions cited this case should be ordered remanded to the County Court of LaFayette County, Arkansas, as the Federal Courts are without jurisdiction.

The Circuit Court also erred in not granting a new trial in accordance with Section 1246 of the Federal Code quoted above.

Respectfully submitted.

COMMISSIONERS ROAD IMPROVEMENT DISTRICT NO. 2. LAFAYETTE COUNTY, ARKANSAS.

By HENRY MOORE, JR. *Attorney*.

No. [redacted]141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit, in Nos. 5454 and 5470.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 2 OF LAFAYETTE COUNTY, ARKANSAS, PLAINTIFF IN ERROR,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

HENRY MOORE, JR.,
Attorney for Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas.

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VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

No. 5454.

St. Louis Southwestern Railway Company,
Plaintiff in Error,

vs.

Commissioners of Road Improvement District
No. 2 of Lafayette County, Arkansas,
Defendant in Error.

In error to the District Court of the United States
for the Western District of Arkansas.

No. 5470.

Commissioners of Road Improvement District
No. 2 of Lafayette County, Arkansas,
Plaintiff in Error,

vs.

St. Louis Southwestern Railway Company,
Defendant in Error.

In error to the District Court of the United States
for the Western District of Arkansas.

STATEMENT OF THE CASE.

1. Road Improvement District No. 2 of Lafayette County, Arkansas, hereinafter called the Road District, was formed under the so-called Alexander Act, Act No. 338, passed by the General Assembly of the State of Arkansas during the year 1915. No question is raised as to the validity and legality of the District. In accordance with Section 11 of said Act, the Commissioners appointed to assess benefits accruing from building the road, assessed the respective benefits against the country lands, against the town lots in the Towns of Lewisville, Stamps and Buckner, and against the railroad tracks of the St. Louis Southwestern Railway Company, the party to this action, and also against the Louisiana and Arkansas Railway Company, being the two railroads running through the Road District. As required by said Section 11, the assessments of benefits against the railroad were made at so many dollars per mile of track. The main line of the St. Louis Southwestern Railway Company, hereinafter called the Cotton Belt Railroad runs East and West through the District approximately parallel to the road, and the Shreveport Branch of the Cotton Belt runs South from the road, being almost at right angles to same. The Louisiana and Arkansas Railway Company runs North and South crossing the road at right angles. The total assessed valuation of all the property within the

Road Improvement District is $1,443,000.25. The total assessed benefit for road purposes is $320,825.25. The assessed valuation of the Cotton Belt Railroad within the District is $581,960.00 and the assessment of benefits for road purposes against said Cotton Belt Railroad is $49,600.50. Within the District are 16.94 miles of main line (that running East and West), and 9.21 miles of side track; also 3.5 miles of main line of the Shreveport Branch. The main line of the Cotton Belt is assessed for state and county purposes at $28,500.00 per mile, and the benefits against same at $2,000.00 per mile. The side track is assessed at $3,000.00 per mile for state and county purposes, and benefits against same at $1,000.00 per mile. The Shreveport Branch is assessed for state and county purposes at $18,000.00 per mile, and the benefits against same at $1,500.00 per mile (Tr. pages 218-54). The portion of the Louisiana and Arkansas Railway Company within the Improvement District is assessed for state and county purposes at $119,350.00, and the benefits against same for the Road District is $20,080.00. The assessment per mile against the Louisiana and Arkansas Railway Company for the state and county purposes is $12,000.00, and the benefits for road purposes $1,500.00 per mile. The assessments against the side track of the said railway company is $2,500.00 per mile, and the benefits for road purposes $1,000.00 per mile. The assessed value of the incorporated Towns of Lewisville, Stamps and Buckner for state and county purposes is $383,270.00, and the assessed benefits for the road 15 per cent thereof, $57,-

400.00. The approximate acreage of country property not including that within the Towns of Lewisville, Stamps and Buckner, is 69,000 acres, and the assessed value of said lands for state and county purposes $364,080.25, and the assessed benefits against the lands for road purposes is $212,103.00 (Tr. page 192).

II. The lands were divided into zones according to their proximity to the improved roads; the lands in the one-mile zone being assessed a benefit for road purposes of $4.00 per acre; within the two-mile zone of $3.00 per acre; and within the three-mile zone $2.00 per acre. A small acreage lying more than three miles from the road, but within the Improvement District was assessed a benefit of $1.00 per acre. In making such assessment of benefits of country property no consideration was given the improvements on the land or the assessed value of the land, whether improved or unimproved, within the respective zones. The assessors stating that in their opinion all of the lands within the respective zones would receive approximately an equal benefit from building of the road, or if any lands received a greater benefit than the other, the wild land, which would be improved and brought on the market because of the road, would receive a greater benefit than the unimproved.

III. The urban property being in town lots or very small acreage, but of a different character from farm property, could not be assessed on an acreage basis, and the benefits accruing to the towns, being of an entirely different character from that to the country lands,

the assessors took the valuation on the tax books for state and county purposes, and assessed a flat benefit for road purposes of 15 per cent thereof.

IV. The railroad property, being of still a third character different in its use and kind from either the country property or the city property, was classified separately and assessed as required by Section 11 of the above mentioned Act 338, at a benefit of so many dollars per mile. As noted from the assessments for state and county purposes the main line of the Cotton Belt is two and one-half times as valuable as the main line of the Louisiana and Arkansas Railway Company, and the Shreveport Branch of the Cotton Belt fifty per cent more valuable than that of the said Louisiana and Arkansas Railway Company. The assessors, however, not taking into consideration the value of the roads, but the benefits accruing, placed a benefit of $2000.00 per mile against the trunk line of the Cotton Belt, and a benefit of $1500.00 per mile each against the Louisiana and Arkansas Railway Company and the Shreveport Branch of the Cotton Belt. Against the side tracks of the two roads an equal benefit of $1000.00 per mile was placed. The Louisiana and Arkansas Railway Company accepted the benefit assessment against same as just and made no appeal therefrom. No other owner of property within the Road Improvement District has protested against or appealed from the assessment of benefits made for road purposes.

V. On the day set for the hearing before the County Court for any protests that might be made

against the benefit assessment for road purposes by parties desiring to appeal from the Board of Commissioners to the County Court, which under Section 13 of said Alexander Act sits as a Board of Review from the decision of the Commissioners, the Cotton Belt Railroad filed its petition for removal to the U. S. District Court for the Western District of Arkansas, alleging that this is a controversy in a suit of a special nature pending before a court of competent judicial authority, and that the amount in controversy exceeds the sum of $3000.00, and that the parties thereto are citizens, one of the State of Missouri and the other of the State of Arkansas (Tr. page 43).

Motion was filed by the Road District to remand the cause to the Lafayette County Court, alleging that the U. S. District Court is without jurisdiction to try the matter at controversy in that the proceeding before the County Court is an administrative proceeding, and therefore not cognizable by the Federal Court; and the proceedings of this special assessment do not constitute a suit within the meaning of the Federal judiciary laws, but the County Court is authorized under the so-called Alexander Act (the Road Improvement District Act of the State of Arkansas), to act as a Board of Review in adjusting the amounts of benefits placed by the assessors against the various lands, town lots and railroad tracks within the Road Improvement District; and in so acting exercises the powers of a Board of Review of Assessors —and does not exercise the powers of a court granted

to the County Courts under the Constitution and laws of the State of Arkansas (Tr. page 50).

After due consideration the motion to remand on behalf of the Road District was by the court overruled, and exceptions to such action on the part of the court duly saved (Tr. page 51).

Out of an abundance of caution in order to preserve this question of jurisdiction a certificate showing that the question of jurisdiction had been raised and a motion to remand filed by the Road District on the ground that this is not a suit within the meaning of the removal statutes, as no appeal is contemplated or allowed by law in a proceeding of this kind, from the County Court of Lafayette County, acting as a Board of Supervisors, to the said U. S. District Court, was presented to the trial judge, who declined to sign same, making a notation on said certificate as follows:

> "The foregoing is presented to the trial judge, and he declined to sign same this the 25th day of June, 1910. Signed Frank A. Youmans." (Tr. pages 237 and 238.)

VI. A demurrer was filed to the exceptions of the Railway Company by the Road District, and afterwards when amended exceptions were filed on behalf of the Railway Company (Tr. 51 to 54), said demurrer was re-propounded to the amended exceptions (Tr. 54). Said demurrer was by the court overruled and exceptions thereto duly saved by the Road District (Tr. 57).

VII. The Road District then filed its reply, alleging that the railroad track within the limits of the road dis-

trict would be of no value severed from the remaining track running through the States of Texas, Louisiana, Arkansas and Missouri, but that the railroad must be considered as a unit or whole, alleging that great benefit would be received by the railroad company because of the increase in traffic due to the building of the improved gravel road, alleging that the benefit had been assessed against the railroad track and against the buildings without taking into consideration the franchise of the railroad company in making such assessment, and asserting that the railway company is a different sort, kind and character of property from the city property or country lands, and must therefore be assessed by the mile, as it is impracticable to assess same on an acreage or valuation basis (Tr. pages 54-56).

On the 19th day of May, 1919, the above suit came on for trial before the Honorable Frank A. Youmans, Judge for the Western District of Arkansas, who on or about said 19th day of May, 1919, on his own motion, after the introduction of evidence withdrew the cause from the consideration of the jury, and filed his decision to the following effect: He found that the assessment of benefits against the property of the defendant railway company in the country, being that outside of the corporate Towns of Buckner, Stamps and Lewisville should be assessed on an acreage basis, the same as lands within said zone were assessed, to-wit: $4.00 per acre, and the amount of acreage in each mile, the right-of-way being 100 feet in width, being slightly in excess of 12 acres per mile, the court found a total benefit per mile

against the Railway Company of $54.00. The total benefit for all of the railroad track outside of said towns as found by the court to be $885.48 (Tr. page 60). To this action of the court the Road District excepted because the kind, character and use of the property was not taken into consideration in making said finding and assessment by the court.

The court further found that the assessment of benefits against the track of the railway company within the corporate limits of the Towns of Lewisville, Stamps and Buckner should be at the same percentage of the actual value of said property including the rail, ties, dump, and all improvements on said property as the assessment of benefits against town lots within said Towns of Lewisville, Stamps and Buckner, and used said basis. After agreement of counsel had been had as to such value, making due deduction so the franchise of the company would not be taken into consideration, the court found a benefit against each mile of railroad within the corporate limits of said towns of $2400.00 per mile, or a total benefit of $9600.00; to said finding and holding of the court the railroad company objected. The total benefit found by the court against all of the track of the Railroad Company within said District was $10,485.48, and to this finding as to the total benefit, both the railroad company and the Road District excepted. The same railroad track being assessed a benefit of $54.00 per mile when in the country and a benefit of $2400.00 per mile when it crosses the corporate limits of the Towns of Lewisville, Stamps and Buckner.

On or about the 25th day of June, 1919, your petitioners were duly allowed by the said Honorable Frank A. Youmans, District Judge for the Western Division of Arkansas, an appeal from his said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and it was ordered that a certified transcript of the record and all proceedings in said case be forthwith transmitted to the said United States Circuit Court of Appeals.

A certified transcript of the record and of all proceedings in the case was duly transmitted to the said United States Circuit Court of Appeals, and on or about the 7th day of January, 1920, an appeal by your petitioners asking that said decree be reversed came on to be heard, and together with the cross-appeal by the respondent was argued by counsel for all parties before Judges Sandlin, Garland and Van Valkenburgh, and thereafter and on the 29th day of April, 1920, said United States Circuit Court of Appeals rendered and filed an opinion and decision written by Judge Garland, which among other things, held that the assessment of benefits by the County Court of Lafayette County, Arkansas, was in fact a suit at law, and not a mere fixing of the value of property for the purpose of taxation, and sustained the decision of the District Court holding that it had jurisdiction in said cause. Said court held that the District Court was mistaken when it said there was no disputed question of fact in the case, but held since neither of the parties, or their attorneys of record, filed a stipulation with the clerk waiving a jury, and

since no objection was made to the action of the court in withdrawing the case from the jury, that the mistake of the court in holding there was no disputed question of fact could not be corrected. Said opinion and decision affirmed said decree of said District Court.

VIII. The questions of law involved in this case are substantially as follows:

1st. Did the District Court for the Western District of Arkansas have jurisdiction to hear this case, and did the said District Court err in not remanding said cause to the County Court of Lafayette County, Arkansas, as this proceeding is not a "suit" within the meaning of the removal statute, over the objections and exceptions of the Commissioners of Road Improvement District No. 2 made at the time that said motion to remand was overruled? Did the United States Circuit Court of Appeals commit error in sustaining the jurisdiction assumed by said District Court?

2nd. Did the United States Circuit Court of Appeals commit error in not reversing the cause for a trial upon its merits after finding that the District Court was mistaken and erred in withdrawing said cause from the jury on its own motion, and in holding there was no disputed question of fact in the case?

All of said questions were duly raised and argued by your petitioners in the said District Court and in said Circuit Court of Appeals, and in said Circuit Court of Appeals a petition for rehearing was presented rais-

ing the questions above, which petition for rehearing was overruled by said Circuit Court of Appeals.

Concerning the question of jurisdiction, Judge Garland said in his opinion, which is reported in Volume 265 of the Federal Reporter, at page 527:

> "We are of the opinion that a proceeding which might result in a judgment against the defendant for the payment of money is a suit at law, and the assessment of benefits in such a proceeding is an assessment in the same way that a jury assesses damages in a civil action at law upon a breach of contract or any other contested liability, and not a mere fixing of the value of property for the purpose of taxation."

On the question as to the error of the court in withdrawing the case from the jury, said judge held:

> "In the case at bar neither the parties, nor their attorneys of record filed a stipulation in writing with the clerk waiving a jury, but the court of its own motion withdrew the case from the jury, and each party without objection to such action of the court presented findings of fact and conclusions of law to the court for its approval. The case, therefore, stands as a civil case at law, tried by the court without any waiver of the jury, as the law provides. Where this is so and the facts are not admitted in a case stated, we have no jurisdiction to review any question on a writ of error, except those which arise in the process, pleading or judgment, and no such question appears. In order that our decision on this question may not be misunderstood, we remark that the trial of the court was mistaken when it said there was no disputed question of fact in the case."

IX. In the case of *Upshur County* v. *Reisch*, 135 U. S., page 467, the Supreme Court in considering a similar case transferred from the County Court of West Virginia, held:

> "Is an appeal from an assessment of property for taxation a suit within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the states, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of assessors, or appeal, or whatever called, it is not usually a court, nor is the proceeding a suit between the parties. It is a matter of administration and the duties of the tribunal are administrative and not judicial in the ordinary sense of the term, though often involving the exercise of *quasi* judicial function. Such appeals are not embraced in the Removal Act. It is true that the tribunal or appeal is called the county court, but it has no judicial powers except in matters of probate; in all other matters it is an administrative board, charged with the management of county affairs."
>
> "The original assessment made by the county assessors could not be called a suit, and could not be removed, and there is justly no more reason for placing an assessment on appeal within that category, and it is nothing but an assessment; in either case, it is an administrative act; the fact that the board of appeal may swear witnesses, does not make the proceeding a suit." *Upshur Co.* v. *Reisch*, 135 U. S. p. 467.

In the case of *M. P. Railway Company* v. *Izard-County Highway Improvement District*, Arkansas Reporter, Volume 143, page 267, the Supreme Court of the

State of Arkansas, where the identical question at issue was presented held that the action of the county court in reviewing and confirming benefits assessed against land within the Road Improvement District was not a judicial but an administrative function, and after citing the case above quoted of *Upshur County* v. *Reisch*, held that such assessment was not a "suit" within the meaning of the law authorizing the removal of cases from a state to a federal court.

> "Appellant contends that under the above section the cause should have been removed to the Federal Court. This contention can not be sustained for the reason that assessments for local improvements by the Legislature or its duly appointed agents—the commissioners and the county courts—are not in any sense judicial proceedings within the jurisdiction of the county court, when exercising the strictly judicial functions conferred upon it by the Constitution. The assessment for local improvements is not a tax in the ordinary sense of that term as used in the Constitution and in statutes generally. *Cribbs* v. *Benedict*, 64 Ark. 555-62; *Paving District of Fort Smith* v. *Sisters of Mercy*, 86 Ark. 109. Nevertheless, assessment for local improvements is a function of the state's sovereign power more nearly akin to that of taxation than any other and is referable to that power. *Ahern* v. *Board of Imp. Dist. No. 3 of Texarkana*, 69 Ark. 68-75; *Carson* v. *St. Francis Levee Dist.*, 59 Ark. 513-31. The power is purely legislative, not judicial." * * *
>
> "The duties which this statute devolves upon the county court, as already stated, are administrative and not judicial, although the line of demarcation is very close."

In a later case, *Monette Road Improvement District* v. *Dudley*, S. W. Reporter, Volume 222, page 59, the Supreme Court of Arkansas affirmed the decision above.

Your petitioners aver that this cause should be remanded to the County Court of LaFayette County, as the Circuit Court of Appeals for the Eighth Circuit Court has declined to follow the decision of this court as set forth in *Upshur County* v. *Reisch*, and also has failed to follow the decision of the Supreme Court of the State of Arkansas in *M. P. Railway Co.* v. *Izard Co. Highway District*, a case where a Federal question is not involved, and where the Constitution and statutes of the State of Arkansas have been construed by the highest court of said State.

X. The Circuit Court of Appeals failed to take into consideration Section 1246, as follows:

> "New Trials. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.
>
> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the rights of the parties (40 Stat. 1181)" (1919 Supplement to U. S. Compiled Statutes, Annotated, West Publishing Co., p. 273).

SPECIFICATION OF ERRORS.

1st. The United States District Court and the Circuit Court of Appeals for the Eighth Circuit were without jurisdiction to hear this case, and the motion on behalf of the petitioner to remand this cause to the County Court of LaFayette County, Arkansas, should have been granted, as said case is not a suit within the meaning of the Federal Statutes.

2nd. Because the Circuit Court of Appeals failed to take into consideration Section 1246 of the Revised Statutes, and failed to grant a new trial after deciding that the United States District Judge was in error in holding that there was no question of fact involved, when in accordance with said section this cause should have been remanded for a trial of said questions of fact by the jury.

BRIEF OF THE ARGUMENT FOR PLAINTIFF IN ERROR.

Under Section 11 of Act 338 of the Acts of Arkansas, for the year 1915, the road law called the Alexander law, the assessors appointed to assess the benefits shall inscribe in a book in appropriate columns the name of the owner of the property, the assessed value and assessed benefits, assessing the railroad benefits by the mile. Under Section 12, said assessors shall assess in said book the damages, if any, accruing to the real property. Then follow Sections 13 and 14, being the sections of the Act under consideration in this cause, same being quoted below, to-wit:

> "Section 13. As soon as the assessors have completed the work of assessment for the district, they shall certify to same and deliver it to the board of commissioners. The commissioners shall immediately file same in the office of the county clerk, and the county clerk of said county shall give public notice by two consecutive insertions in a publication having a general circulation in said county. Said notice shall give a description of all lands embraced in said district in the largest subdivision practicable and shall state that said assessment of benefits and damages has been filed in said office and shall call upon any person, firm or corporation aggrieved by reason of any assessment to appear before the County Court on some date to be fixed by the court, not less than five days after the last insertion therein, for the purpose of having any errors adjusted, or any wrongful or grievous as-

sessment corrected, and all grievances or objections to said assessment shall be presented to said court in writing. Any person who is damaged by reason of said improvement may appear before said court at the same time, for the purpose of having the assessment of damages adjusted.

The County Court shall hear and determine the justness of any assessment of benefits, or damages, and is hereby authorized to equalize, lower or raise any assessment upon a proper showing to the court.

Section 14. At the hearing provided for in the preceding section, and after the County Court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the County Court shall have all the force and effect of a judgment against any real property in said district, and it shall be deemed final, conclusive, binding and incontestible except by direct attack on appeal.

Any owner of real property within the district may appeal from the judgment fixing the assessment of benefits or damages within ten days by filing an affidavit for appeal and stating therein the special matter appealed from, but such appeal shall affect only the particular tract of land or other real property concerning which said appeal is taken, and on appeal only the special matters set up in said affidavit shall be considered by the Circuit Court.

If no appeal is taken within that time, judgment shall be deemed final, conclusive and binding upon all real property in the district, and the owners thereof, and said assessment of benefits shall not be subject to collateral attack.

The board of commissioners on behalf of the district or any owner of real property therein, may likewise appeal from any order of the County Court

> refusing to enter such judgment, and said County Court may be compelled by mandamus to enter such judgment."

This proceeding is not a suit within the meaning of the Federal Removal Acts. The County Court, in passing upon the benefits received from the building of the road under the sections above quoted, was acting in an administrative and not a judicial capacity. Said County Court, occupying the position and having the same authority as that of the Board of Supervisors under the Constitution of Arkansas, of 1868.

The authority and jurisdiction of the County Courts is derived from Section 28 of Article 7 of the Constitution of the State of Arkansas.

> "County Courts shall have exclusive original *jurisdiction* in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, and the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvements and local concerns of the respective counties."

Under Section 23 of the Schedule of the Constitution of the State of Arkansas,

> "The county courts provided for in this constitution shall be regarded in law as a continuance of the Board of Supervisors now existing by law."

Said Board of Supervisors, the predecessors of the County Court, received their authority from the Legislature under Section 1 of Article 7 of the Constitution of Arkansas of 1868, being as follows:

> "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, and the Supreme Court, Circuit Courts, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Since the decision of this cause by the district court, the Arkansas Supreme Court has definitely decided, in *Horne* v. *Baker*, 140 Ark. p. 172, that in approving the plans and in determining finally the benefits received from the building of the road, the County Court is acting in its administrative rather than its judicial capacity. Said decision is to the effect that an appeal may be taken to the Circuit Court from such administrative decisions, but it is definitely and finally settled there that such decisions as the one at issue in the present cause are administrative. Said decision also refers to Schedule 23 of the Constitution of 1874, where the county courts were made successors and a mere continuance of the former board of supervisors of the counties, and thus given exclusive, original control over internal improvements within their counties.

> "There is nothing in the act referred to, however, which indicates that the County Court was to act in this instance in any manner other than as it ordinarily acts in the disposition of administrative matters over which it is given jurisdiction by the constitution. * * * The statute probably did not contemplate the allowance of an appeal in this class of cases, for the legislation is borrowed from states where acts prescribed to be performed by the County Court are administrative purely, and where no appeal is allowed, but the right to appeal has been found elsewhere, and is established by the

> decisions of this court. * * * Under authority of Section 33, Art. 7, of the Constitution of the State of Arkansas, appeals have been uniformly granted as a matter of constitutional right from all judgments of the County Court, and no distinction has been made between administrative matters and judicial causes." *Horne v. Baker, supra.*

From the above, it is clearly established that the County Court in performing the duties prescribed by the sections of the constitution above cited, acted under the authority of the legislature, as a board of review, and not in its judicial capacity. This identical question came before the United States District Court in Chicago, and said court held that the County Court, under authority granted by the legislature, was acting in a legislative or administrative capacity, and therefore the action was not a *suit* within the meaning of the Federal Removal Act, and the Federal Court was without jurisdiction.

In Re City of Chicago, 64 Fed. page 897.

In two later cases the above mentioned decision was referred to and upheld. However, the cases were not remanded, since under the specific authority of the constitution creating the County Court in one instance, and under the decisions of the Supreme Court of the state in the other instance, the county courts could not act in any other than judicial capacity.

C. M. & St. P. Ry. Co., 198 Fed. page 253.
In Re Mississippi Power Co., 241 Fed. page 194.

There is also the recent case of *Smith v. Douglas County, Nebraska*, 254 Fed. page 240, decided by the

Court of Appeals of the Eighth Circuit, and on which decision the opinion of the District Court seems to have been based. Attention is called, however, to the fact that the County Court was given authority to determine all questions in relation to taxes, not being confined, as in the present case, to merely determining the amount of such taxes or benefits. Further, as in the cases above cited, the county courts in Nebraska, under the constitution, are given certain original jurisdiction and such other jurisdiction as may be given by statute (see page 246, 254 Fed. Rep.).

This clearly differentiates said decision, and the decisions in other states having only judicial authority from the present cause arising under the laws and Constitution of Arkansas, where the County Court exercises both judicial and administrative powers. The assessment of benefits in the instant case is a local assessment and not a tax in the sense in which these words are used in the Constitution of Arkansas, and since the County Court, as a court under the constitution, has no authority over local assessment or over taxes, save county taxes, the legislature could not give the court jurisdiction in a judicial capacity to determine the amount of benefits received by lands within the road district.

> "The local assessment necessary for the proper execution of the act (creating a ditch improvement district) in any given locality, are not taxation in the sense in which that term is used in Section 2, Art. 23 of the Constitution, as has been often held by this court." *Cribbs v. Benedict*, 64 Ark. p. 562.

In the Missouri case, strongly relied upon by the railway company, under Section 36 of Art. 6 of the Missouri Constitution, the County Court has jurisdiction to transact all county business, and all other business such as may be prescribed by law. Said County Court of Missouri, therefore, can only act in a judicial capacity, having no authority as an administrative body, as is the case in Arkansas. 191 Fed. page 259.

In the Iowa case, relied upon, under the decision of the Supreme Court of Iowa, only judicial functions may be exercised by the County Court.

> "but powers that are not to be exercised in the discharge of the functions of the judicial department cannot be conferred on the courts, or changes designated by the constitution as part of the judicial department of the state." *State* v. *Barker*, 116 Iowa, page 96, quoted in 241 Fed. Rep. p. 198.

And in *Smith* v. *Douglas County*, the Nebraska case, the county courts are given, not administrative, but such judicial jurisdiction as may be granted by statute. 254 Fed. Rep. page 246.

A careful reading of the above cases shows that they fully sustain the case heretofore cited, *In re City of Chicago*, the distinction being that county courts in the last three cases cannot exercise administrative powers, whereas in the Chicago case and in Arkansas, the county courts' functions are largely occupied in administrative rather than judicial actions.

The question at issue has been finally and definitely settled by the decision of the Supreme Court of the

United States in *Upshur County* v. *Reisch*, 135 U. S. page 467, arising in the State of West Virginia, and in which state the County Court, just as in Arkansas, exercises administrative as well as judicial functions. In said case the United States Supreme Court decided that the Federal Court could not take jurisdiction over the exercising of such administrative or judicial functions, and that the cause not being a suit within the Federal Removal Act, same was remanded to the County Court. Practically the same question was at issue in the Upshur case, as in the present, it being not the right to tax property, but the amount of such taxes that could justly be laid against the property. The Supreme Court held:

> "Is an appeal from an assessment of property for taxation a *suit* within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the states, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of assessors, or appeal, or whatever called, it is not usually a court, nor is the proceeding a suit between the parties. It is a matter of administration and the duties of the tribunal are administrative and not judicial in the ordinary sense of the term, though often involving the exercise of *quasi* judicial function. Such appeals are not embraced in the Removal Act. It is true that the tribunal or appeal is called the county court, but it has no judicial powers except in matters of probate; in all other matters it is an administrative board, charged with the management of county affairs."
>
> "The original assessment made by the county assessors could not be called a suit, and could not be removed, and there is justly no more reason for

placing an assessment on appeal within that category, and it is nothing but an assessment; in either case, it is an administrative act; the fact that the board of appeal may swear witnesses, does not make the proceeding a suit." *Upshur Co. v. Reisch*, 135 U. S. p. 467.

The County Court, acting as the board of appeal, from the decision of the assessors, as in the Upshur case, above cited, had no judicial powers, and the District Court erred in not remanding this cause to the County Court because of its lack of jurisdiction.

It was held in *ex parte Wisner*, 203 U. S. p. 449, that the consent of parties could not give jurisdiction to the Federal Courts where such jurisdiction did not exist by law. This holding however, seems to have been changed in *In re Moore*, 209 U. S. page 490, and in the case of *In re Winn*, 213 U. S. page 458, it being held that consent of parties could confer jurisdiction where the Federal Court had no jurisdiction of the controversy, originally, or by removal. In a later case, *Kreiah v. Westinghouse, Church, Kerr & Co.*, 214 U. S. page 249, where it appeared no motion was made to remand, the court held that jurisdiction was obtained by consent of the parties. In this case a motion to remand having been filed in apt time, the District Court and Circuit Court of Appeals has no jurisdiction unless the cause of action is a suit of a civil nature, and one of which said court could originally have taken jurisdiction.

Unless the assessors for the Road District could have originally filed its report in the United States Dis-

trict Court, and asked said court to raise or lower the various assessments, and exercise the authority given by statute to the County Court in its administrative capacity, then this cause could not be properly transferred from the County Court to the United States District Court, since the jurisdiction of the United States Courts on removal is limited to such suits as might have been brought originally in said courts. The case referred to by the railroad, *Madisonville Traction Co.* v. *St. Bernard Mining Company*, 196 U. S. page 239, is not in contravention of the claim of the Road District on the question of jurisdiction, since such case only holds that an action for condemnation is such a suit that it may be transferred to the Federal Courts, and could have originally been brought in the Federal Courts. Under Section 1010 of the Act of January 20, 1914, the authority is granted for the removal of cases from a state to a U. S. District Court, the authority being the same as that granted by the Act of 1887, which restored the rule of 1789, the expressed intention of the act being, as stated in *Cochran* v. *Montgomery County*, 199 U. S. page 60, to restrict the jurisdiction of the Federal Court, and that this was accomplished largely by withholding the right of removal from state to Federal Courts. The court further held:

> "Such cases were only liable to removal from a state to the Circuit Court as might, under the law, or in all events under the constitution, have been brought before the Circuit Court by original process. * * * The Act of 1887 restored the rule of 1789, and as we have heretofore decided, those

suits only can be removed of which the Circuit Courts are given original jurisdiction."

Cochran v. *Montgomery County*, 199 U. S. page 260.

It was also stated, *In re Winn*:

"It is well settled that no case can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the lower court."

213 U. S. page 458.

The same question was referred to as one well settled, and not needing argument, by Judge Rogers, as organ of the Circuit Court of Appeals of the Eighth Circuit, as follows:

"The jurisdiction of the United States Circuit Court on removal by the defendant from a state court is limited to such suits as might have originally been brought in the United States Circuit Court by the plaintiff in the first section of that act."

Wall v. *Franz*, 100 Fed. Rep. page 681.

This was a proceeding for the probate of a will in Arkansas, and the attempt was made to transfer the case to the Federal Court. Since the Probate Court and the County Court, under the Arkansas Constitution have the same powers, this decision is peculiarly applicable as setting forth the duties and jurisdiction of the county and probate courts in Arkansas. As there stated by Judge Rogers, in referring to the question of jurisdiction:

"It must be remembered that the question is not whether Congress has the power under the constitution to confer jurisdiction upon Federal Courts, but the question is, has it been done, and the action of the courts from the foundation of the government down to the passage of the Act of 1888, could be accepted as an absolute denial thereof, and unless it can be shown that by the Act of 1888 the jurisdiction in respect to the subject-matter under consideration was acknowledged, the court should await further action upon the part of Congress before assuming jurisdiction of this new and novel class of cases heretofore confined in England to ecclesiastical courts, and to this country to statutory courts adopted especially for their hearing."

100 Fed. Rep. C. C. A. page 681.

A state constitution may delegate to its courts either judicial powers alone or judicial, administrative and legislative powers, and although cases may be transferred from state to Federal Courts where judicial power is brought into question, such transfer may not be had where the powers are either legislative or administrative.

The State Corporation Commission of Virginia, by the constitution of the state, was given a dignity and importance that added judicial to its other functions, and was for some purposes a court within the commonly accepted meaning of that word. However, when an attempt was made to transfer a proceeding from said Corporation Commission to the Federal Courts, this right was denied by the Supreme Court where the legislative functions were at issue.

"Proceedings legislative in nature are not proceedings in court within the meaning of the statute, no matter what may be the general or dominating character of the body in which they may take place. * * * That question depends, not upon the character of the body, but upon the character of the proceedings."

Citing decisions.

"And it does not matter what inquiries may have been made as a preliminary of the legislative act, most legislation is preceded by hearings and investigations, but the effect of the inquiry and of the decision upon which, is determined by the nature of the act to which the inquiry and decision led up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. *Prentiss* v. *Atlanta Coast Line Co.*, 221 U. S. page 226, 23 L. E., page 159."

This decision squarely supports the Upshur case, heretofore cited, holding that causes other than judicial ones cannot be transferred to the Federal Court, and further holding that the same person or body of men may in certain instances be a court exercising judicial authority, and in other cases have purely administrative or legislative powers granted under the constitution and law of the state.

Hundreds of road districts have been organized under the Alexander law, the one here under consideration. The Legislature of Arkansas, during the year 1919, at its regular and special term, passed probably two hundred and fifty special road acts. If there exists the right to transfer each assessment of benefits amounting to more

than $3,000 where the land owner is a non-resident, for decision from the County Court to the Federal Courts then the wheels of justice may well be clogged with such administrative matters, and the courts unable to attend to their judiciary functions, if such transfers are to be allowed. Under the decisions above cited it is most earnestly contended that this cause could not have originally been brought in the United States District Court, and that such court is therefore without jurisdiction to consider same, and that this cause must be remanded to the County Court of Lafayette County, Arkansas.

On April 5, 1920, in the case of *Mo. Pac Ry Co. v. Izard County Highway Improvement District*, 143 Ark. p. 267, the Supreme Court of Arkansas decided that the County Court in making an assessment acts in a purely administrative capacity, and that such action is not a judicial proceeding within the statutes.

The above mentioned case was cited and copy of the opinion placed before the Circuit Court of Appeals, which court failed to follow the decision of the Supreme Court of Arkansas in rendering its decision in this case on April 20, 1920.

The petition for a re-hearing was filed June 24, 1920, and said decision of the Arkansas Supreme Court, as well as the more recent decision of *Monette Road Imp. Dist. v. Dudley*, 222 Southwestern Reporter, p. 59, was again called to the attention of the U. S. Circuit Court of Appeals. They again declined to follow such decision and denied the petition for a rehearing, on August 2, 1920 (Transcript p. 258).

The courts of the United States follow the decisions of the Courts of Last Resort in the several states in the matter of the construction of the Constitution, Statutes, etc., of such states.

United States ex rel. Pierce v. *Cargill*, 258 Fed. Rep. 458 and cases cited. *Hartford Life Insurance Co.* v. *Blincoe U. S. Supreme Court*, advance opinions, decided Feb. 28, 1921.

The Supreme Court of the State of Arkansas in *M. & P. Ry. Co.* v. *Izard County Highway Imp. District* (Ark. Rep. Vol. 143, p. 267), wherein the identical question as to whether or not such a proceeding as that involved in the present case before this Honorable Court, was a *suit* within the meaning of the law authorizing the removal of causes from a state court to a federal court, was an issue, held that an owner of land objecting to Road Improvement District Assessments, on hearing before the County Court was not entitled to a removal of the cause to the United States District Court under the Federal Statute; such hearing being held not to be a judicial proceeding within the jurisdiction of the County Court when exercising the strict judicial functions conferred upon it by the Constitution, and that assessments for local improvements by the Legislature or its duly appointed agents, the Commissioners and the County Courts are not in any sense judicial proceedings within the jurisdiction of the County Court when exercising the strictly judicial functions conferred upon it by the Constitution of the State of Arkansas.

The Arkansas Supreme Court in this case cites the case of *Upshur County* v. *Rich* (*supra*), which arose upon a statute of West Virginia, and says:

> "The jurisdiction of the County Court under the Constitution of West Virginia, when the above decision was rendered was substantially the same as that conferred upon the County Court under our Constitution so far as Roads and the internal affairs of the county are involved. We conclude, therefore, that the assessment of the commissioners and the proceedings thereafter in the County Court were in no sense a suit in law or equity, within the purview of the Federal Judicial Code."

The Supreme Court of Arkansas in a very recently decided case (May 24, 1920), *Monette Road Imp. Dist.* v. *Dudley*, S. W. Reporter, Vol. *222*, page 59 affirmed its holding in *M. & P. Ry. Co.* v. *Izard County Highway Imp. Dist.* (*supra*).

The Monette Road Imp. Dist. was formed for the purpose of improving certain roads in Craighead County, and said district in this case made application to the Supreme Court of Arkansas for a writ of prohibition directed to the judge of the Circuit Court of Craighead County to prevent said Circuit Court from hearing and determining proceedings involving the validity of the acts of the Commissioners of said District in assessing certain benefits and in attempting to construct the improvement. In deciding the case the Supreme Court says:

> "The real question in the case is whether or not the Circuit Court had jurisdiction to grant the relief sought in the complaint.

> The functions of the Board of Assessors in assessing benefits, and the Board of Commissioners in adjusting them on complaint of the property owners is not judicial in the ordinary sense, but, it is in the nature of a legislative power.
>
> Boards created as special tribunals for certain purposes may, and sometimes do, act in a judicial or quasi-judicial capacity, and when so acting their proceedings may be reviewed on certiorari, but in the matter now before us, the commissioners do not act in such capacity. (Citing various authorities including the Izard Company Highway Imp. Dist. Case) * * *
>
> The writ of prohibition is therefore awarded in accordance with the prayer of the petitioner to prevent the Circuit Court from further proceeding in the matters under consideration."

In re City of Chicago, 64 Fed. Rep. p. 807, the Circuit Court for the Northern Div. of Ill., held that assessment proceedings for municipal improvement were an exercise of the taxing power, and an administrative act, and did not constitute a "suit" within the provisions for removal of suits to federal courts, though they are conducted under judicial forms by a court of general judicial powers.

This was a case where the City of Chicago moved to remand to the County Court of Cook County, a special assessment proceeding for putting in a sewer, which case had been removed to the Federal Court on petition. In a carefully considered opinion, the court, by Judge Seaman, following the decision of the United States Supreme Court in *Upshur County* v. *Rich* (*supra*), ordered that said remand be made.

We note that a decision upon the question, in such cases as this, as to what constitutes *a suit* within the provisions for removal of suits to federal courts, depends very largely upon the language of the statutes of the state under consideration in each of such suits, and we respectfully submit that there is nothing in the cases referred to by the Circuit Court of Appeals as sustaining the ruling of the court below, that in any manner does away with the opinion of the Supreme Court of the United States in *Upshur County* v. *Rich*, 135 U. S., hereinbefore referred to. It is shown in the opinion in this case, rendered by Justice Bradley (for a unanimous court) that every decision of the U. S. Supreme Court referred to on this point by the Circuit Court of Appeals as sustaining the ruling of the court below (except 196 U. S. 239), was considered by the court in arriving at the opinion rendered; reference being made particularly to said cases by the court, and after considering same the court unanimously held that such a proceeding for an assessment of property for taxation is not a suit within the meaning of the law authorizing the removal of causes from a state to a federal court. All of said cases so referred to were decided prior to the decision in *Upshur County* v. *Rich*, except the case of *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239.

This last mentioned case arose under a Kentucky statute in a proceeding for the taking of land by eminent domain, and the question at issue under the Kentucky statute being construed, was the amount of damages which the owner of the land being condemned, was en-

titled to, and for which amount the statute provided for a judgment to be rendered, and this case cannot be relied upon as conflicting with the opinion in *Upshur County* v. *Rich*, or as controlling in the present case where it is found that the Arkansas statute is in all "essential particulars for the purpose of this discussion" similar to the statute of West Virginia, construed by the Supreme Court of the United States, and held not to justify the removal of said proceedings to the Federal Court.

And so we beg to suggest that a reference to the various cases in federal reporters will show that the decisions therein depend upon the wording of the statutes and constitutions of the various states wherein these cases arose, and that no such decision referred to should be controlling so as to overturn the decision of the Supreme Court in *Upshur County* v. *Rich*.

The case of *Smith* v. *Douglass County*, 254 Fed. 244, was a proceeding in a matter of an assessment of inheritance taxes against real and personal property under a Nebraska statute, against the property of a decedent, which property was claimed by another, as surviving joint tenant, so that the proceeding was a contest *inter partes* between the two claimants and under the Nebraska Constitution, the court properly held that it was a suit within the removal statutes.

In re Jarnecke, 69 Fed. 161. It was held that under the Indiana statute prescribing proceedings for the establishment of drains and assessing the benefits and damages thereof, the cause was removable to the Federal Court. But an examination of the opinion shows that it

was the particular nature of the proceedings under the Indiana statutes that differentiates said case from the principle announced in *Upshur County* v. *Rich;* and the court in discussing said statute and the proceedings thereunder, says:

> "The proceeding does not involve the mere exercise of the taxing power of the state. It is in the nature of the exercise of the power of eminent domain, and contemplates the taking of land whereon to construct the drain, as well as the assessments of benefits on the remaining lands, whereby to pay for its establishment and construction. In this particular it differs from a proceeding solely for the purpose of raising money by the exercise of the taxing power to aid in the construction of a public improvement. This differentiates the present case from that of *In re City of Chicago*, 64 Fed. 897, and other cases of like character, which holds that a proceeding solely for the purpose of raising money by the exercise of the taxing power for the construction of a public improvement is not a suit, although such proceedings may be conducted in a court of general jurisdiction."

The case of *In re Stutsman County*, 88 Fed. 337, was a proceeding for the collection of delinquent taxes provided for by the laws of North Dakota. The District Judge (Amidon), in his opinion recognizes the binding force of the opinion in *Upshur County* v. *Rich* (*supra*), and shows that under the terms defined by the Supreme Court of the United States, the proceeding under consideration has every element of a suit. And the court shows that "it has been expressly held by the Supreme Court of Minnesota (from the statute of which the North

Dakota law was taken) and North Dakota, that the proceedings under this statute is a *suit*, and the same conclusive force is given to a judgment entered therein as to judgments and decrees in actions at law and suits in equity."

The case of *Terre Haute* v. *Railway*, 106 Fed. 545, was remanded to the state court on account of want of the requisite diversity of citizenship, but for which the cause might have been removed. In holding that but for the lack of diverse citizenship, the cause might have been removed, the court held this upon a construction of the Indiana statute providing for the appropriating of real estate for the opening of streets, in which it is set forth that the questions of benefits or damages are "issues of law and fact" that "may be formed, tried, and determined as in other actions at law."

There is nothing in the case to sustain the removal of the cause at present under consideration by this Honorable Court.

In the case of *Drainage District No. 19* v. *Ry. Company*, 198 Fed. 253, the decision of the District Court for the Western District of Missouri overruling the motion to remand to the state court, is based upon the wording of the Constitution and statutes of the State of Missouri. The court holding that the proceedings were a suit in the county court vested by Art. 6, paragraphs 1 and 36 of the Missouri Constitution with judicial powers and we submit that there is nothing whatever in said opinion to uphold the order of removal in the cause under

consideration. The court in the commencement of its opinion notes that similar questions in the Federal Courts have been variously decided according to the facts and the local laws specifically involved, and says: "This case must be determined upon its own facts and the special statute under which it arises."

In the case, *In re Mississippi Power Company*, 241 Fed. 194, decided by the District Court of Iowa, next referred to by the Circuit Court of Appeals, the motion to remand was overruled, but here again the order of the Federal District Court was made after the cause had by appeal, provided for in the statute, reached the District Court of the state, and it is clearly shown in the opinion that the removal could not have been made simply upon the assessment proceedings. The following is a quotation from the district judge's opinion:

> "(1) Of course, the assessment and levy of taxes is legislative in its character, or, as it is sometimes expressed, it is administrative; but it is an exercise of the legislative power.
>
> The legislature has the power to designate the tribunal which shall make assessments upon property. It may confer this power upon a judicial or a non-judicial body, and the owner of property assessed, cannot claim that he has been deprived of, 'due process of law,' because the legislature does not permit him to have a hearing in court. So that the Legislature of Iowa had the power to prescribe a method of assessment, and levy and collection, of taxes, without providing for any hearing before any court.
>
> (2) It is the contention of appellant that by the appeal provided for, the District Court of the

state is simply made part of the 'machinery' by which, and through which the taxing power of the state is exercised. It is insisted that the action of the court in reviewing upon appeal, the action of the board of review is administrative rather than judicial. If this be true, then this proceeding is not a suit within the Removal Act.

But at the outset, we are confronted with the fact that the District Court of Iowa is a constitutional court, possessed of no administrative powers or functions, and the Supreme Court of Iowa has specifically held that non-judicial powers cannot be conferred upon the District Court by the Legislature."

In the case of *C. M. & St. Paul Ry. Co. v. District No. 8*, 253 Fed. 491, the remaining case referred to by the Circuit Court of Appeals in support of the refusal to remand the case at bar, the same district judge rendered the opinion as in the next preceding case hereinabove cited, and it appears that this case had been passed upon by the district judge (Wade, J.), prior to the submission of the case *In re Mississippi Power Co.* (*supra*), and Judge Wade had sustained the motion to remand to the state court.

In a supplemental opinion rendered after a decision made in the Mississippi Power Company case, Judge Wade upon a further study having been made of the Iowa statutes, overruled his order to remand and held that under the Iowa statutes the case was removable; but in this opinion there is nothing to sustain a refusal to remand the case at bar. In speaking of the Iowa statutes under consideration and the railway company as a party to the suit, the court says:

> "It proceeds in the only way authorized by the Legislature. There was no *suit* possible until it had perfected its appeal, but instantly the appeal was perfected there was a *suit*, and in the spirit of the law I believe that it ought to have and I believe that it has the right to remove the case for trial."

In *City of Toccoa* v. *Marchbanks*, 261 Fed. 684, in a condemnation proceeding under the Civ. Code of Georgia, the District Court N. D. Georgia, held upon a construction of the Georgia statutes giving the right of appeal to the Superior Court of the County, the City of Toccoa had the right to transfer the cause to the Federal Court, but held further that, in accordance with the Georgia statutes, the time for filing a petition for removal was limited to the 10 days allowed for entering appeal, which 10 days having expired, said cause was remanded, showing how closely the state statutes are followed in deciding questions of this charcter.

In *M. P. Ry. Co.* v. *Izard County Highway Improvement District*, *supra*, the Supreme Court of Arkansas held an assessment of benefits is not a "suit," and that the decisions of the County Court are administrative and not judicial. Said case is on all fours with the present one, and since the federal courts will follow the decisions of the court of last resort of a state in construing its own constitution and statutes, this case should be remanded to the Lafayette County Court, as the United States Courts are without jurisdiction.

To sustain the second ground alleged in the petition for writ of certiorari, to-wit: That the Circuit Court of

FILED
SEP 29 1921
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 1 OF LAFAYETTE COUNTY, ARKANSAS,
Petitioners,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

No. 141

On Writ of Certiorari to United States Circuit Court of Appeals for Eighth Circuit.

BRIEF AND ARGUMENT FOR RESPONDENT.

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JAMES A. FREEMAN,
L. F. LOOMIS,
Attorneys for Respondent.

SUBJECT INDEX.

List of Authorities Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 OF LAFAYETTE COUNTY, ARKANSAS, Petitioners, vs. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Respondent.	No. 552.

On Writ of Certiorari to United States Circuit Court of Appeals for Eighth Circuit.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF FACTS.

Road Improvement District No. 2 of Lafayette County, Arkansas, the plaintiff in the District Court, is a municipal corporation, organized under act 338 of the Acts of 1915 of the General Assembly of the State of Arkansas, commonly known and hereinafter referred to as the Alexander Road Law. In an ap-

pendix to this brief, we set out so much of that act as is pertinent to the issues.

On January 18, 1918, a majority of land owners within a district embracing approximately 70,000 acres of land in Lafayette County, Arkansas, including twenty and one-half miles of the St. Louis Southwestern Railway Company, filed a petition under Sections 1 and 2 of the Alexander Road Law in the County Court of Lafayette County, praying that a district be incorporated for the purpose of constructing a gravel road across the County, parallel with the main line of respondent (Printed Record, pp. 8 to 12).

Thereafter the County Court, upon due notice, made and entered an order, incorporating the district under the terms of the Alexander Road Law. This order of the court has become final and conclusive, since it was subject to attack only upon the appeal within thirty days, and no appeal therefrom was taken (Printed Record, p. 17).

On March 15, 1918, upon petition of the Road District, the County Court, in accordance with Sections 9 and 12 of the Alexander Road Law, appointed a board to assess the benefits and damages accruing to the lands within the district by reason of the building of the road (Printed Transcript of Record, p. 30).

The assessors upon completing their assessments delivered same to the Board of Commissioners and

thereupon the District, in compliance with Section 13 of the Act, filed the same in the County Court on May 22, 1918.

Whereupon the County Court entered an order directing the clerk of the court to publish a notice warning property owners within the district, that said assessments had been filed and that any one objecting thereto could file objections upon which a hearing would be had in the County Court on June 28, 1918 (Printed Transcript, pp. 34 and 35).

Benefits in said assessment were assessed against rural property in the aggregate amount of $212,103.00; against urban property, $57,490.00; and against the respondent, $49,706.50 (at rate of $2,000.00 per mile on main line, and $1,500.00 per mile on branch line property); and against the Louisiana & Arkansas Railway in the aggregate of $2,080.00 (Printed Transcript, p. 192).

On June 27, 1918, the respondent, a railroad corporation organized and doing business under the laws of Missouri, a citizen and resident of St. Louis, Missouri, filed in the County Court a petition and bond for removal of the cause to the Federal Court. This petition was denied (Printed Transcript, pp. 42 and 45).

On July 18, 1918, the respondent filed a certified copy of the record of the said suit in the District Court of the United States, at Texarkana (Printed Record, p. 6).

On November 7, 1918, petitioners filed a motion to remand the cause in Lafayette County Court, which motion was heard and overruled on February 12, 1919 (Printed Record, pp. 50 and 51).

The case was heard before the Court and Jury, but upon the conclusion of the evidence, the Court, withdrew the case from the Jury, on its own motion,, without objection (Printed Transcript, p. 231).

Thereupon the Court rendered a judgment, reducing the benefits against respondent from $49,706.50 to $10,485.48 (Printed Transcript, p. 62).

Both parties prosecuted writs of error to the Circuit Court of Appeals, which, on April 29, 1920, affirmed the judgment of the District Court.

The Road District prayed a writ of certiorari which this Court has granted.

(To follow at end of page 5)

The decision in the Izard County case would not control that in this case, since it was rendered long after the judgment of the District Court herein (and indeed but a few days prior to the filing of the Opinion of the Court of Appeals herein), even if it related solely to a question of state law, and was by the Federal Courts felt to be binding upon cases brought subsequent to its rendition.

Burgess vs. Seligman, 107 U. S. 20.

BRIEF.

The petitioner's first assignment of error is that both the District Court and the Circuit Court of Appeals erred in overruling its motion to remand the cause to the County Court of Lafayette County. This assignment is based upon its contention that the proceeding is an administrative and not a judicial proceeding or suit within the removal statutes.

The determination of this assignment of error depends upon whether or not the facts in this case bring it within the decision of Upshur v. Rich, 135 U. S. 467, 34 L. ed. 196, or within the class of cases of which the Pacific Removal Cases, 115 U. S. 1, 29 L. ed. 319, and Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 49 L. ed. 462, are representative. The District Court and the Circuit Court of Appeals held that the latter was true while the State Supreme Court in Missouri Pacific Railroad Company v. Izard County Highway Improvement District No. 1, 143 Ark. 261, now before this court upon writ of error, held to the contrary.

The plaintiff in error contends the decision of the Supreme Court of Arkansas in the case last mentioned has concluded in its favor the question of removability.

It would seem strange, indeed, if the question of the right to remove could be concluded and determined by the decision of the state court.

The United States courts are necessarily tribunals to determine matters of this kind.

It is inconceivable that a state court can deprive a citizen of its rights by holding that a particular class of cases is not removable to the Federal Court, or by doing the same thing indirectly by holding that any particular tribunal is not acting judicially.

Upon this question the Court in Upshur v. Rich, 135 U. S., p. 467, supra, said:

> "Although we are not concluded by this decision, it is so much in harmony with our own decision on the same question that we accept it as correct."

Therefore if the decision of the Supreme Court of Arkansas, upon the question of removability, is not in harmony with the decisions of this court, this court is

lative and not judicial, and, second, that in the Upshur case the Supreme Court, in "passing upon the statute of West Virginia, held that an appeal from an assessment of property for taxation was not a suit within the meaning of the law, and also the jurisdiction of the County Court under the Constitution of West Virginia was substantially the same as that conferred upon the County Court under our Constitution."

The decisions of this court lay down the following principle: If a given proceeding (1) involves the adjudication of juridical rights of which the District Court would have had original jurisdiction, and (2), is a contest inter partes between citizens, and (3) is pending in a judicial tribunal empowered to hear and determine questions of law and fact, it is a removable suit.

Upshur v. Rich, 135 U. S. 467, 34 L. ed. 196;
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. ed. 462;
Pacific Removal Cases, 115 U. S. 1, 29 L. Ed. 319;
Boom Company v. Patterson, 98 U. S. 403, 25 L. ed. 206;
Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927;
Searl v. School District No. 2, 124 U. S. 197, 31 L. ed. 415;
Smith v. Douglas County (C. C. A.), 254 Fed. 244.

We shall consider the facts in this case with a view of demonstrating that the instant proceeding satisfies all of these requirements.

I.

This Cause Involved the Adjudication of Juridical Rights of Which the District Court Had Original Jurisdiction.

In the case of Prentis v. Atlantic Coast Line R. R., 211 U. S. 210, 53 L. ed. 150, this Court said, "A judicial inquiry investigates, declares and enforces liabilities as to present or past facts and under laws supposed already to exist. That is its purpose and its end. Legislation on the other hand, looks to the future and changes existing conditions by making new rules to be applied thereafter."

The exercise of the power of eminent domain in so far as the determination to take a given piece of property is concerned by a state is clearly a legislative function. On the other hand the ascertainment of the owner's damages by reason of that taking is a judicial function.

The determination of whether or not certain improvements should be made is a legislative act. So, also, is the determination or manner in which the funds necessary to pay for it shall be raised, and how the tax shall be apportioned. The Legislature may provide

that the entire burden shall be borne by the public or by the specific property benefitted by the improvement or by both, may itself apportion the tax or it may lay down the rules by which the burden shall be apportioned, provided, of course, that it keeps within the constitutional limitations. All these facts are clearly legislative.

In laying down new rules, again the legislature may provide, as it has done in the act in question, that the burden may be apportioned according to the benefits. So much of the act in question as provides that the tax shall be borne in accordance with the benefits, and that the benefits shall be determined in judicial proceedings is an exercise of legislative power, a looking to the future. But in the same connection the act confers two juridical rights upon the land owners which they may enforce in the courts; first, that the burden shall be apportioned in accordance with the benefits, and second, that the amount of benefits shall be determined by the courts.

The determination that the burden shall be apportioned in accordance with the benefits is legislative, but the determination by a court of the amount of the benfits is essentially a judicial function.

Under the Alexander Road Law, the Legislature itself did not attempt to fix the benefits, but it did provide that the property owners within the district could

be assessed for the cost of the improvement, **only to the extent that the value of their property was enhanced by it.**

The act provided that in the same proceeding, and in the same maner in which the benefits were to be assessed and adjudicated, the damages to property owners were likewise to be fixed and adjudicated.

There is no diffierence between the legal principles or proceses by which the amount of damages which the construction of a road will do to a given piece of property are fixed, and those by which the amount of benefits which it will confer upon that property are fixed.

In either case, the measure of the damages or of the benefits, is the difference between the value of the property before the road is constructed and its value after the road is constructed. To put it another way, damages are negative benefits, or benefits are negative damages.

Under the act in this case the Road District is permited to set off benefits against damages, and likewise the property owner is permitted to set off the damages against benefits (Section 12 of the Alexander Road Law).

The conclusion is irresistible, that since a proceeding to measure the quantum of damages done by an improvement unquestionably involves juridical rights of property, then in like manner a proceeding to measure the amount of benefits conferred by the improve-

ment also involves the adjudication of juridical rights.

It seems a matter of supererogation to state, much less to cite, authority to support elementary reasoning so self evident. We do both only because the learned Supreme Court of the State in the Izard County case has held that the issues are administrative and not judicial.

The fundemental error of the State's decision lies in the fact that it is predicated upon the premise that an action wherein a municipal corporation ceases to have benefits ascertained and layed as a lien against land is in all respects analogous to the case (as in Upshar Rich), where a property owner protests against the amount of the assessment of his property for the state and county taxes. That this premise is erroneous is conclusively settled by this Court.

The proceeding involved in the case of Union Pacific Railway Company v. Kansas City (Pacific Removal Cases, 115 U. S. 1, 29 L. ed. 319) is identical in all respects with the case at bar. The proceeding there was brought by Kansas City to widen and improve one of its streets. The initial assessment of benefits and damages, instead of being made by a Board of Assessors, as in this case, was made by the Mayor and a jury. In each case, however, the initial assessments were preliminary inquests. From the initial proceeding the Railroad Company appealed to the Circuit Court of the state, from which it removed the case to

the Federal Court. **This Court, in deciding that the case was removable, held that the question whether or not the assessment of benefits against the property of the Railroad Company was too large, was a juridical one and constituted a removable suit.**

The same rule is stated and applied in the following cases:

Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed 206;
Searl v. School District, 124 U. S. 197, 31 L. ed. 415;
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. ed. 462;
Smith v. Douglas County, 254 Fed. 244;
Jarencke Ditch, 69 Fed. 161;
Re Stutsman County, 88 Fed. 337;
Terre Haute v. R. R. Co., 106 Fed. 545;
Drainage District No. 19 v. Ry. Co., 198 Fed. 253;
Re Mississippi Power Co., 241 Fed. 194;
C. M. & St. P. Ry. Co. v. District No. 8, 253 Fed. 491.

The claim is made, however, at pages 26 and 27 of petitioner's brief, that "Unless the Assessors for the Road District could have originally filed its report in the United States District Court, and asked said Court to raise or lower the various assessments, and exercise the authority given by statute to the County

Court in its administrative capacity, then this cause could not properly be transferred from the County Court to the United States District Court, since the jurisdiction of the United States Courts on removal is limited to such suits as might have been brought originally in said Courts."

This statement is based, no doubt, upon the authority of the cases which hold that a suit cannot be removed from a state court unless it could have been brought originally in the District Court of the United States.

Learned counsel for the petitioner have mistaken the form for the substance. Those authorities hold merely that the cause which is sought to be removed must be one of which the District Court could have had original jurisdiction. That is, that it must be a suit; it must be between citizens of different states, etc., and must involve more than $3,000.00, etc.

When a controversy meets with these requisites, then it is beyond the power of the state legislature to prescribe any form of procedure which will prohibit the Federal court from exercising its jurisdiction. The jurisdiction of the Federal court is not destroyed because the State has undertaken to declare that the proceeding can only be maintained in a designated State Court, or has indirectly attempted to bring about that result by providing for a peculiar or unusual mode of initiation.

There is no reason, however, why this particular proceeding could not have originated in the District Court. The assessment roll, as will be hereafter seen, was a written petition by the district, claiming that it had benefited the property of respondent in a given amount, and praying that such amount be fixed as a lien against respondent's property.

The Alexander Road Law makes the proceeding involving the determination of the amounts of benefits, separate and distinct in its entirety from the proceedings involving the organization and corporation of the district, and the administration of its affairs.

While the petition of the district laying the assessment of benefits incorporates in one document the benefits against the property of a number of property owners, yet the contest between each property owner and the district as to the amount of his benefits, is a separate and distinct controversy and under the terms of the Act it is provided that his objection and appeal shall affect only the particular tract of land or other real property concerning which it is taken (Sections 13 and 14).

In Fitch v. Creighton, 65 U. S. 159, 16 L. ed. 596, this Court held that it had jurisdiction over a cause involving the enforcement of an assessment of benefits; a proceeding unknown either at law or in equity.

In Parker v. Overman, 59 U. S. 137, 15 L. ed. 318,

this Court held that it had jurisdiction of a special statutory remedy, whereby a purchaser at a judicial sale, filed an ex parte petition in the court asking that the sale be confirmed, and where the Court, after the publication of warning order and hearing, did confirm the sale.

In Fleitas v. Richardson (147 U. S. 536, 37 L. ed. 272), the Court held that the District Court had original jurisdiction over a proceeding under the Louisiana Code of Practice of "Executory Process" and a sale of mortaged property for payment of debt.

In Sheffield Furnace Co. v. Withrow (149 U. S. 573, 37 L. ed. 853), this Court held that the District Court had jurisdiction of special statutory proceedings to enforce mechanics' liens.

There is no difference between a proceeding wherein a mechanic, claiming that he has put certain improvements upon the owner's property without any contract with that owner, and asks that the owner's property be subjected to a lien therefor, and this proceeding wherein the petitioner alleges that it has benefitted the respondent's property and prays that such property be subjected to a lien therefor.

The conclusion to be deduced from all these cases is that the **form** of proceeding is of no consequence in determining whether or not the case is removable.

The issue, however, is foreclosed by the case of the Madisonville Traction Company v. St. Bernard Mining Company (196 U. S. 239, 49 L. ed. 462).

In that case, under the Kentucky statutes, the Traction Company, being unable to agree with the owners of the lands which it desired to condemn for its use, filed with the clerk of the County Court a description of such lands and a petition that Commissioners be appointed to assess the damages.

The Commissioners were duly appointed, as required by the Act, and after filing their report, the clerk was required to issue process by warning order as to nonresident owners, and by personal service to resident owners. The case under the statute was then to be tried in the County Court, and if either party was dissatisfied it could be appealed to the Circuit Court and tried de novo. It is to be noted that the procedure is exactly the same as in the case at bar.

After the Commissioners had been appointed and filed their report, but before any action was taken, the Mining Company field its petition and bond for removal. It was there urged, as it is here urged, that the suit was not one that could be removed, since it would have been impossible for the Traction Company to have instituted the proceedings in the Federal Court in the first instance.

In reply to this contention the Court said:

> "Why could not the proceeding instituted in the County Court have been brought originally in the Federal Court? This case, as made in the County Court, was beyond question a judicial proceeding; it related to property rights, the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the 'Judicial power shall extend to controversies between citizens of the United States,' as well as by the Act of 1887, Paragraph 1, which declares that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and cost, the sum of $2,000.00 in which there shall be a controversy between the citizens of different states."

Although there was a dissenting opinion in this case, such opinion was to the effect that the power of eminent domain of the State Legislature can be restricted by it up to the point where nothing is at issue but the assessment of damages, but when that point is reached a controversy within the meaning of the removal statutes is had because the exercise of sovereign power of the state is at an end, and the former owner has a right to his say.

Since the case at bar in only a question of the benefits and damages, both the opinion of the Court and the dissenting opinion sustain our contention.

II.

The Proceeding Was a Controversy Inter Partes Between Citizens.

In the Upshur case, supra, the Court pointed out that the State of West Virginia was a party to the suit, if it was a suit, and that such a suit not in the catagory of removable cases, since "The state is not a citizen if the county is." No such situation is met here. Neither the state nor the county was a party and neither has any interest in the case. Petitioner is a body corporate, authorized to sue and be sued.

In the Upshur case, there was considered an application of a tax payer addressed to an administrative board of the county, praying that the assessed value of his property for ad valorem taxes be reduced. The case at bar was initiated by a municipal corporation against the respondent by the filing of a written claim that it, the corporation, by the construction of a public road, had enhanced the value of respondent's property, and praying that the Court find such enhancement to be the amount of benefits assessed by it, and that same be declared a lien upon the land of the respondent.

This pleading, to all intents and purposes, amounted to a petition or complaint at law. When this petition was filed the clerk of the court gave notice to the owners of land affected, by publication of a warning order, in precisely the same manner as constructive notice by publication is given in the State of Arkansas, or in any action where jurisdiction can be obtained by constructive rather than personal service of process.

After this process had been served, respondent appeared and before the day upon which it was required to answer this petition, which answer, by the way, the statute required to be in writing, filed its petition for removal to the District Court.

If, instead of filing the petition to remove, respondent had answered, the cause would have been heard by the Court, petitioner appearing on one side and the respondent on the other.

How can it be said that a proceeding wherein one party appears demanding that a fixed amount of money be declared to be a lien upon the property of another party, and such other party also appears and contests that demand, is ex parte and not inter partes?

There is no difference between the situation in this case and that in the Pacific Removal case, supra, and in the Madisonville Traction case, supra. In both of these cases, and in the instant case, we have the situa-

tion of a corporation as the party upon one side, sometimes a municipal corporation, sometimes a private corporation, exercising some high prerogative of the state, such as the right of eminent domain in the Madisonville case, and the property owner as the party upon the other side. In each case a sum of money is in controversy and that sum is measured by the difference in value of the property owner's property before and after the thing which is sought to be done by the corporation is done. If such a proceeding is not an adversary one inter partes, then it is impossible for us to conceive a case that would meet that requirement.

III.

The County Court of Lafayette County, in Which This Cause Was pending at the Time it Was Removed, Was a Judicial Tribunal Empowered to Hear and Determine Questions of Law and Fact.

Petitioner's contention and the decision of the Arkansas Supreme Court in the Izard County case, that the County Court of Lafayette County, Arkansas, was not a judicial tribunal in hearing the cause as to the amount of assessments for benefits, but was an administrative board, is based almost entirely on the fact that in the Upshur case, supra, this Court held that a

board of three Commissioners, bearing the misnomer of "County Court," was not a judicial tribunal.

Whether or not a given tribunal is a judicial or administrative one should not be determined by the name which has been given it by the statutes, but should be determined by the power and jurisdiction which it exercises.

The fact that the tribunal was designated "County Court" in the Upshur case, does not mean that all "County Courts" are non-judicial tribunals, and causes pending therin non-removable. In Madisonville Traction Co. v. St. Bernard Mining Company, supra, the "County Court" of Kentucky, upon which the Arkansas court is modeled, was held to be a judicial tribunal. At page 251 of that decision, it is stated:

> "There was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as ordained by its Constitution (Kentucky Statutes, paragraph 120), and the Court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

An analysis of the constitutional and statutory jurisdiction of the County Courts of Upshur and Lafayette counties demonstrates beyond peradventure of a doubt, that the state court's statement that their

jurisdiction was "substantially the same" is wholly erroneous.

In the Upshur case it is stated that the Constitution of West Virginia of 1872 conferred judicial powers upon the county courts, but by an amendment in 1880, its judicial powers were withdrawn except in matters of probate. By the same amendment it was provided that the county court should be composed of three commissioners upon whom was conferred "jurisdiction" in the matters of probate, but "superintendence **and administration**" in internal police, etc., and the Legislature was authorized to confer other powers upon it **"not of a judicial nature."**

Any order which was made by the so-called County Court of West Virginia, was not one from which an appeal would lie to the courts constituting the judicial system of the state, but was an administrative order, reviewable by the court, only by collateral atack (Low v. County Court, 27 W. Va. 785).

That the situation in the instant case is wholly different is shown by the constitution of the State of Arkansas. In this connection we regret that we are compelled to point out that the quotations from the State Constitution set out at pages 8 and 9 of the petition for writ of certiorari, and at pages 22 and 23 of the brief thereon, are unintentionally misleading, in that the sections of the present constitution granting juris-

diction are omitted and the provisions of the former constitution of 1868 substituted. This error has been corrected in petitioner's second brief, page 20.

Section 1 of Article VII of the present Constitution of the State reads as follows:

> "The judicial power of the State shall be vested in one Supreme Court, in Circuit Courts, in County and Probate Courts and in Justices of the Peace."

Section 28 of Article VII provides:

> "County Courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, and the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvements and local concerns of the respective counties."

In the case of Pierce v. Eddington, 38 Ark. 150, it was held:

> "The County Court is a superior court of record in the sense that within the scope of the subject matters over which it has jurisdiction and in the absence of a showing to the contrary, it will be presumed that it has acted upon facts sufficient to maintain its action."

In the case of Board of Directors of St. Francis Levee District v. Redditt, 79 Ark. 154, an act of the legislature conferred upon the County Court original jurisdiction in a proceeding for the assessment of damages caused by the construction of a levee by a municipal corporation. It was contended upon behalf of the land owners in the case cited that this act was unconstitutional. The Court, in passing upon this question said:

> "The constitution vests in the County Court exclusive original jurisdiction in all matters concerning county taxes, roads, bridges, etc., and then this additional jurisdiction: 'And in every other case that may be necessary to the internal improvement and local concerns of the respective counties' (Const. 1874, Art. VII, Sec. 28). Public levees to reclaim overflowed and swamp lands and restrain inundation from the mighty rivers within this state, and bordering it are the best types of internal improvements and are indisputably within the contemplation of this clause of the constitution. Therefore it follows that the jurisdiction conferred on the County Court in these matters is within the constitutional jurisdiction of that court, and the statutes are not for that reason void."

Section 33 of Article VII reads:

> "Appeals from all judgments of County Court or Courts of Common Pleas, when established,

may be taken to the Circuit Court under such restrictions and regulations as may be prescribed by law."

Section 2287 of Crawford & Moses Digest of the Arkansas statutes provides that "appeals shall be granted as a matter of right to the Circuit Court from all final orders and judgments of the County Court * * *."

Section 2236 of the same digest declares that upon such appeal the Circuit Court "shall have jurisdiction of the subject matter to the same extent as though original jurisdiction had been conferred upon the Circuit Court by law."

It follows as corollary from this statute that if the County Court acts in a legislative or administrative capacity in passing upon benefits that the Circuit Court also acts administratively. The jurisdiction of the County Court over the matter is precisely the same as the jurisdiction that the Circuit Court would have upon appeal. It should not be gainsaid that this proceeding when it reaches the Circuit Court, which is unquestionably a court and not an administrative board, would become a removable suit. Since under the constitution and the statutes the County Court has precisely the same jurisdiction as the Circuit Court, and since, indeed, it may be stated that the Circuit Court has no jurisdiction except that which

the County Court has, it follows that the case must be a suit when it reaches the County Court.

That the Circuit Court upon appeal acts judicially is clearly shown by the Izard County case. At page 269 of that decision, we find this statement:

> "Cases where there is an appeal under the statute from trial in the Circuit Court on the question of the amount of benefits assessed in the improvement district **fall within the rule that this court on appeal will be bound by findings of the trial court where the evidence is legally sufficient to sustain the finding.**"

That is, the Circuit Court is not acting administratively but judicially, nor is the Supreme Court sitting as a reviewer of the facts, a quasi super board of assessors, but the judgment of the Circuit Court as to the amount of benefits is the judgment of the court at law which the appellate court will not disturb if there is any evidence to support it.

The County Court, as we have seen, is a court of record of superior jurisdiction, created by the constitution. The Circuit Court is also a superior one of record created by the constitution. When these two constitutional courts act upon the identical pleadings, and the identical evidence, it is inconceivable that one of them could be acting in merely an administrative capacity while the other is acting in a judicial ca-

pacity. Especially is this true when the one which is acting judicially derives its jurisdiction solely thorugh the other, acting administratively. One of the two things must be true, either both the County Court and the Circuit Court in passing upon the question of the amount of benefits exercised judicial powers or both exercised legislative powers.

As further vindicating our contentions that the County Court of Arkansas is a superior court of record, and so considered throughout the Constitution of Arkansas, it is well to observe Section 37 of the same Article VII, which provides that "The Judge of the County Court may issue provisional writs such as orders for temporary injunctions and writs of habaes corpus." Certainly the issuance of these high prerogative writs is not vested in administrative boards, but only in courts.

Preceding the Alexander Road Improvement District Law by several years, a general drainage statute existed in Arkansas upon which the Alexander Road Law is largely based, and in considering the jurisdiction of the County Court and whether that jurisdiction is administrative or judicial in regard to roads, it is vital to weigh the decisions upon the general drainage law as throwing light upon the subject. The most striking feature of the general drainage district law, as indicating a fixed intent of the General Assembly to treat the proceedings as always judicial in

character, is that the identical act applies whether the district operates in one county or in more than one, but if in one county only, the County Court of that county has jurisdiction; but, "if land in more than one county is embraced in the proposed district, the application shall be addressed to the Circuit Court of either county and all proceedings shall be had in such Circuit Court."

C. & M. Digest, Section 3607, Act Apr. 28, 1911, p. 193, Sec. 1.

Nothing could more strongly indicate a determination to make the proceedings judicial than this provision, because the Circuit Court is the court of general jurisdiction in Arkansas, and does not act ministerially in any respect whatever, but is always a court and its acts are always judicial.

Further vindicating the contention that acts of the County Court under the general drainage statute of Arkansas are judicial purely, and not administrative, let us remember that condemnation proceedings are always judicial and removable, and that under the general drainage statute the filing of the assessment of benefits is also the filing of the assessment of damages, and that unless objection be made, the order establishing the assessment of benefits establishes the damages and condemns the land.

C. & M. Digest, Sections 3613, 3615, 3616.

The provisions of the general drainage statute above referred to is upheld as being due process of law for the condemnation of lands in the case of Dickerson v. Tri County D. D. (1919), 138 Ark. 471.

This provision for the condemnation through the assessment which has been sustained as being due process of law, appears substantially in the Alexander Road Law above referred to.

In the case of Road Improvement District No. 6 v. Hall, 140 Ark. 241, 215 S. W. 262, the Court held that the condemnation proceeding by filing the assessment under the Alexander Road Law was not exclusive, but that the Commissioners might bring suit in the Circuit Court to condemn the land for right of way, or might follow the provision for assessing damages to the land and thus taking it summarily. The Court held that if the property owner demanded an assessment of damages by a jury, an action should be instituted in the Circuit Court. In other words, the result of this decision is, that the Court upheld the statute as providing for a condemnation through the County Court by the mere confirmation of the assessment of damages, but upheld also, as an additional remedy, a separate proceeding in the Circuit Court. The proceeding in the Circuit Court would be beyond doubt, a suit and removable as such. It seems plain to us, that the alternative remedy by assessment of damages, and its confirmation through the County

Court must likewise be a judicial proceeding and not merely an administrative one. Otherwise, the mere form of the proceeding, and not the substance, dictates the question of removability and a state statute can take away the jurisdiction of the Federal court, merely by giving a different form to a condemnation suit.

In the statute in question, section 13, it is provided, that "the County Court shall hear and determine the justice of any assessment of benefits or damages, and is hereby authorized to lower or raise any assessment upon a proper showing to the Court."

In section 14 it is provided, that "At the hearing provided for in the preceding section, and after the County Court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against the said property, or increasing or diminishing the same, and the order made by the County Clerk shall have all the force and effect of a judgment against all real property in the said district, and shall be deemed final, conclusive, binding and incontestable, except in direct attack upon appeal."

It is further provided in section 5432, that the County Court shall enter an order "which shall have all the force and effect of a judgment, levying the tax to pay the estimated cost of the improvement with ten per cent additional."

(To follow the first paragraph on page 30)

In a number of the Arkansas Improvement District Acts the Assessment of Damages and Benefits is made final unless "Suit be brought to review the same" within a limited time. The State Courts have held that in such cases, even where no forum is designated, the remedy to review the Assessment is by suit in Equity, where the questions are tried in precisely the same manner as they are tried in the County Court under the Alexander Law.

Board of Commissioners vs. Gas. Co., 121 Ark. 110.
Missouri Pacific Ry. Co. vs. Road District, 137 Ark. 568.

Wherein does this Suit in Equity (undoubtedly removable) differ from the proceedings in the County Court, especially in view of the fact that when the latter forum is available it affords an "adequate remedy at law" and the Suit in Equity will not lie?

St. Louis, etc., Ry. Co. vs. McLaughlin, 232 Fed. 579.
Chapman Dewey Land Co. vs. Road District, 127 Ark. 378.

Section 5433 provides that "The tax so levied shall be lien upon all the real property in the district from the time same is levied by the County Court, and shall be entitled to preference over all demands, executions, encumbrances or liens whatsoever created, and shall continue until such assessment with penalty and costs that may accrue thereon, have been paid. The remedy against such assessment and levy shall be by appeal, which may be taken as provided in Section 5424, and on appeal the presumption will be in favor of the legality of the tax."

In the instant case, it is interesting to note the form of the judgment confirming the assessment against the respondent's property which was entered by default in the County Court, after respondent's petition for removal had been filed, and which order, if said case was improperly removed, has now become "final, conclusive, binding and incontestable,' since the thirty days in which a direct attack upon appeal have elapsed. The order is shown in the printed transcript the record, pp. 35 to 37.

It recites the appearance of the petitioner in person and by attorney, and the default of all other parties; it recites the adjournment of the court to the day on which judgment is rendered; it recites the publication of warning order in the same manner as constructive service by publication in any default

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proceeding in Arkansas; it recites in detail, matters of evidence and record which the Court considers, and recites as finding of the Court that the assessments are "justly and equitably made", and in conclusion, "it is therefore considered, ordered and adjudged by the Court that said assessments of benefits made by the assessors for said District be, and the same is, hereby approved and confirmed by this Court."

Not satisfied with thus foreclosing respondent's rights, a special clause is added for respondent's benefit, as follows:

> "It is further considered, ordered and adjudged by the Court, that the assessment of benefits made against the St. Louis Southwestern Railway Company, and against the Louisiana & Arkansas Railway Company as to the line of railroads of said respective companies in said District by the Assessors for said District be approved and confirmed by the Court."

It is strange that an ancient formula, peculiar to the common law courts, "considered, ordered and adjudged" by the Court should be used in the decision of an administrative board acting non-judicially.

It is stranger still that the judgment of that Court should be merely the order of an administrative board, although it is "final, conclusive, binding and

incontestable, except by direct attack upon appeal."

The following language which was used by Judge Amsdon, in a case involving the same question, In re Stutzman County, 88 Fed. 337, is peculiarly applicable to this case:

> **"It is difficult to appreciate the force of that reasoning which attaches to a proceeding in court as to its effect upon the rights of the parties, all the consequences of a suit, but for the purpose of determining the jurisdiction of the Federal Court, holds the same proceeding to be purely administrative."**

In the Upshur case, the County Court had no judicial power (except probate), and the Legislature was prohibited from giving it any judicial powers. In the Madisonville Traction Company case and in the case at bar the County Court was a tribunal, ordained by the constitution of the states as a part of the judicial system, and although charged with some duties of an administrative character, is a judicial tribunal and a superior court of record.

Learned counsel for petitioner in his brief is somewhat exercised by the fact that the affirmance of the decision of the Circuit Court of Appeals will not only bring down a flood of litigation upon the Arkansas federal courts, but will also inconvenience and retard the development of public improvements within the State, especially in view of the large number of districts created by the General Assembly in 1919.

We concede that the fecundity in road district legislation at that session of the Arkansas Legislature will stand for years unequaled and unenvied. We concede, also, that if the people of the State had not arisen and put an end to the vast majority of these projects, and that if State courts in Arkansas continued their policy of enhaloing the assessments made by the boards of assessors of the various districts and of erroneously declining to revise the same, however excessive they might be, that many non-resident owners of property would have been compelled to seek protection of their constitutional rights in the federal courts. But where, under such circumstances, have the federal courts denied them relief because to do so might result in crowding their dockets?

Two instances of how convenient and desirable a thing it was, from the standpoint of the road districts for these intolerable conditions to continue, are shown in the case of the Kansas City Southern Railway Company v. Road District No. 6, decided by this court on June 6, 1921, and reported in 65 Law Edition, at page 16, Advance Opinion No. 17, July 15, 1921, p. 715, where a railroad was assessed nearly $68,000.00 for the construction of a gravel road, and in which this Court held that the discrimination was so palpable and arbitrary as to amount to a denial of the equal protection of the law, and in the instant case wherein the Railroad Company was assessed $50,-

000,00, substantially as much as the total of all city property within the district, and one-fourth as much as all the rural property within the district, comprising over seventy thousand acres. This assessment was by he District Court reduced to a little over $10,000.00, or one-fifth of the original assessment.

If the railroad company had not the right to remove this cause to the federal court, the $50,000.00 assessment will stand since it was made final after the filing of the petition for removal by an ex parte order of the County Court.

This case is not to be decided by the question of convenience or inconvenience of either of the parties hereto, or indeed, of the federal courts themselves. The issue before this Court is whether or not the District and Circuit Court of Appeals were in error in assuming jurisdiction of this case. If they were not, then this case will be affirmed, regardless of the convenience of anyone.

In conclusion, we submit that the determination of the amount by which the value of a given piece of property will be enhanced by the construction of a public improvement; that is, the amount of benefits thereto, is the determination of a juridical right and that the District Court would have had original jurisdiction of a suit involving that issue.

That the case at bar is a controversy between a municipal corporation upon the one hand, authorized

to sue and be sued, and a railroad corporation upon the other hand, the former demanding that a lien amounting to, in round numbers, $50,000.00, be laid against the property of the railroad company to secure the payment of that sum of money by the railroad company to the district, and that, therefore, this proceeding is a contest inter partes between citizens authorized to sue and be sued in the courts of the United States, and,

That this proceeding at the time it was removed was pending in the County Court of Lafayette County, Arkansas, a tribunal empowered both by the constitution and the statutes of the State of Arkansas to hear and determine all questions of law and fact arising in this proceeding.

We therefore submit that this case meets all the requirements of a removable suit, that the District Court and the Circuit Court of Appeals did not err in overruling petitioner's motion to remand the same to the County Court of Lafayette County, Arkansas.

Respectfully submitted,

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St. Louis, Mo., September 12, 1921.

APPENDIX.

"THE ALEXANDER ROAD LAW"

Sections of Act 388 of Arkansas for 1915, involved herein.

Organization.

Section 1. Whenever a majority in land value, acreage or number of land owners within a proposed Road Improvement District in any county shall petition the County Court to establish a Road Improvement District to embrace a certain region which it is intended shall be embraced within the boundaries of the proposed district shall file a plat with said petitions upon which the boundaries of the proposed District shall be plainly indicated, showing the roads which it is intended to construct and improve as nearly as practicable, and shall also file a good bond conditioned that petitioners will pay all court costs and legal advertising that may accrue in the event said district is not established, it shall then be the duty of the County Court to give public notice by publication in some weekly newspaper having a bona fide circulation in said county by three consecutive insertions therein

that said petition has been filed, and giving a description of the territory embraced in said petition in as large subdivisions or calls as practicable, and calling upon all persons, firms, or corporations owning land or other real property within the proposed district to appear before the County Court on some date to be fixed by the Court not less than five days after last insertion of said notice to show cause for or against the establishment of said district. The original petition may be circulated among the land-owners, or such number of exact copies of same as may be deemed necesary may be circulated, and when all of said petitions are filed at or before the time of the hearing above mentioned the said petitions shall be consolidated and treated as one petition, if same are filed before or at the date of said hearing (Crawford and Moses Digest, Ark. Statutes, Sec. 5399).

Section 2. The County Court, at the hearing provided for in the preceding section, shall determine the sufficiency of said petitions, and if any person whose name appears on the petition shall, for any valid reason, desire to remove his name from said petition, he shall state his reasons therefor in writing, and any person who objects to the formation of said district shall present his objections in writing. If it appears to the County Court that the petition is signed by either a majority in land value, acerage, or in number of land-owners within the proposed district, and if the

County Court deems it to the best interest of the county and the land-owners in said district, it shall be the duty of the County Court to make an order establishing said district, such majority in acerage, number of land-owners, or majority in land value to be determined by the assessment for the purpose of general taxation in force in said county at the time, and if the County Court is of the opinion that any part, or parts, of the territory included in the petition and plat is not benefited by the proposed improvement the Court may, in the order creating said district, eliminate such territory from the boundaries of this district. The petition may be signed by women who own real property, whether married or single; guardians may sign for their wards, and trustees, executors and administrators may sign for the estate represented by them, and, if the signature of any corporation is attested by the corporate seal, the same shall be sufficient evidence of the assent of the corporation to said petition. The words "real property," or "land," wherever used in this Act, shall include land, improvements thereon, railroads, railroad rights-of-way and improvements thereon, including public buildings, sidetracks, etc., and tramroads (C. & M. Dig., Sec. 5401).

Section 3. The order of the County Court establishing a Road Improvement District shall have the force and effect of a judgment and shall be deemed conclu-

sive, final and binding upon all territory embraced in said district, and shall not be subject to collateral attack, but only to direct attack on appeal (C. & M. Dig. 5402).

Any owner of real property within the district may appeal from said judgment establishing the district within thirty days by filing an affidavit for appeal, stating in said affidavit the special matter on which said appeal is taken, and any owner of real property may likewise appeal from the order of the County Court refusing to establish such district or eliminating any territory therefrom. No appeal shall delay the proceedings for carrying out the proposed improvement after the order of the County Court establishing same is made, and any party appealing within the time herein prescribed shall be deemed to have waived any objections he may have to said order, and to have relinquished all rights he may have had to question same (C. M. Dig. 5403).

Section 4. When the County Court makes an order establishing a road improvement district, it shall also make an order declaring the same to be, and to exist, under the name of Road Improvement District (name and number) of....County, Arkansas, and said district shall then become a body politic and corporate by said name and may sue and be sued, plead and be pleaded, and have perpetual succession for the purpose of building, constructing, maintaining and re-

pairing the roads in said district (C. & M. Dig. 5404).

The County Court, at the same time, shall also appoint three persons, owners of real property in said district and men of business ability, to act as commissioners for said district (C. & M. Dig. 5405).

Assessment of Benefits.

Section 9. As soon as the commissioners have formulated the plans for the district, and shall have ascertained the cost thereof, they shall report same to the County Court and file the official plans for said district in the office of the County Clerk. The County Court shall at its first regular, special or adjourned term held thereafter, appoint three owners of real property within said county, who shall constitute the Board of Assessors for said district (C. & M. Dig. 5419).

Section 10. The Board of Assessors shall meet at a time within thirty days, to be designated by the president of the Board of Commissioners, and shall take the oath prescribed in Section 20, Article XIX of the Constitution of Arkansas, and shall also swear that they will well and truly assess the benefits to be received by each land-owner by reason of the improvement as affecting the lands or other property in said district, which oath shall be filed with the county clerk of the county and duly recorded in the proceedings for the

district. A majority of the assessors shall constitute a quorum for the transaction of business. If any person appointed by the Court as assessor shall fail or refuse to take the oath within thirty days, he shall be deemed to have declined to serve, and his place shall be filled by the County Court appointing another person to fill the vacancy. The said appointment may be made by the County Judge in vacation or at a regular, special or adjourned term of said court. The assessors shall hold their office until the work is completed or until they are removed by the County Court for any good reason, and shall receive as compensation for their services a sum to be fixed by the commissioners and approved by the County Court, not to exceed five dollars per day (C. & M. Dig. 5420).

Section 11. The assessment of benefits shall be made by the assessors in a book bound in permanent form and furnished by the district and at such a time as directed by the Board of Commissioners.

The assessors shall assess the benefits to be received by the several and particular tracts of land, railroads, tramroads and other real property within the district by reason of the improvement. All lands embraced in said district shall be entered upon said book in convenient subdivisions, as surveyed by the United States, and appearing upon the assessment books in force at the time in said county in appropriate columns showing: (1) name of the owner; (2) subdivision of land;

(3) number of acres; (4) present assessed value; (5) assessed benefits per acre; (6) assessed benefits to each tract, and, if it be a railroad, or tramroad, the name of the owner thereof, the supposed mileage in said district, the present assessed value of said railroad and other property belonging to said company, and the amount of assessed benefits per mile, and the total amount of the benefit assessed against said railroad or tramroad, and no error in the name of owners or description of property shall invalidate said assessment if sufficient description is given to identify same, and any error or mistake in making said assessment may be corrected at the hearing hereinafter provided for (C. & M. Digest 5421).

Section 12. The assessors shall also assess the damages accruing to any owner of real property, if any, in the same book in which the assessment of benefits is made, and said damages may be paid out of the funds of the district, or by a reduction in the assessment of benefits in proportion to the amount of the damages sustained by reason of right-of-way taken, or other damages sustained (C. & M. Dig. 5422).

Section 13. As soon as the assessors have completed the work of assessment for the district, they shall certify to same and deliver it to the Board of Commissioners. The commissioners shall immediately file same in the office of the County Clerk, and the County Clerk of said county shall give public notice by two consecu-

tive insertions in a publication having a general circulation in said county. Said notice shall give a description of all lands embraced in said district in the largest subdivision practicable and shall state that said assessment of benefits and damages has been filed in said office and shall call upon any person, firm or corporation aggrieved by reason of any assessment to appear before the County Court on some date to be fixed by the court not less than five days after the last insertion therein, for the purpose of having any errors adjusted, or any wrongful or grievous assessment corrected and all grievances or objections to said assessments shall be presented to the court in writing. Any person who is damaged by reason of said improvement may appear before said court at the same time for the purpose of having the assessment of damages adjusted. The County Court shall hear and determine in justness of any assessment of benefits or damages, and is hereby authorized to equalize, lower or raise any assessment upon a proper showing to the court (C. & M. Dig. 5423).

Section 14. At the hearing provided for in the preceding section and after the County Court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the County Court shall have all the force and effect of a judgment

against all real property in said district, and it shall be deemed final, conclusive, binding and incontestable except by direct attack on appeal (C. & M. Dig. 5424).

Any owner of real property within the district may appeal from the judgment fixing the assessment of benefits of damages within ten days by filing an affidavit for appeal and stating therein the special matter appealed from, but such appeal shall affect only the particular tract of land or other real property concerning which said appeal is taken, and on appeal only the special matters set up in said affidavit shall be considered by the Circuit Court.

If no appeal is taken within that time such judgment shall be deemed final, conclusive and binding upon all real property in the district, and the owners thereof, and said assessment of benefits shall not be subject to collateral attack.

The Board of Commissioners, on behalf of the district, or any owner of real property therein may likewise appeal from and order of the County Court refusing to enter such judgment, and said County Court may be compelled by mandamus to enter such judgment (C. & M. Dig. 5425).

Lien of Assessment.

Section 19. The County Court shall, at the same time that the assessment of benefits is filed by the commissioners for said district, enter upon its record an

order which shall have all of the force and effect of a judgment, providing that there shall be assessed upon the real property in the district a tax sufficient to pay the estimated cost of the improvement with ten per cent added for unforeseen contingencies, which tax is to be paid by the real property of the district in proportion of the amount of the assessment of benfits thereon, and which is to be paid in annual installments payable not to exceed twenty per cent for any one year, as provided in such order (C. & M. Dig. 5432).

The tax so levied shall be a lien upon all of the real property in the district from the time same is levied by the County Court, and shall be entitled to preference over all demands, executions, incumbrances or lien whatsoever created, and shall continue until such assessment with penalty and cost that may accrue thereon have been paid. The remedy against such assessment and levy shall be by appeal, which may be taken as provided in Section 9119, and on appeal the presumption will be in favor of the legality of the tax. Any owner of real property within the district may by mandamus compel a compliance by the County Court with the terms of this section (C. & M. Dig. 5433).

Section 20. It shall be provided by resolution of the Board of Commissioners that the local assessments of benefits shall be paid in successive annual installments, so that no local assessment shall in any one year ex-

ceed twenty per cent of the benefits assessed against said real property. The resolution of the commissioners shall be made for the whole period during which the assessments are to be collected, and they shall transmit to the County Clerk a copy of this resolution before September first each year. The resolution shall state the per cent of the benefits to be extended on the county tax books and collected by the collector each year along with the other taxes. When the resolution is filed with the County Clerk, he shall extend the amount of tax provided for in said resolution of the board, along with the other taxes to be extended, and shall receive as compensation for his services an amount equal to that received for similar services performed for the county, and said amount shall be paid out of the fund of said road improvement district. In paying the tax provided for herein, or any costs or penalty thereon, as between grantor and grantee, all payments not due at the time of the transfer shall be payable by the grantee (C. & M. Dig. 5431).

Enforcement of Assessments.

Section 25. If the assessment of the district as certified to by the Clerk of the County Court to the collector shall not be paid by the time fixed by law for the payment of county taxes, a penalty of twenty-five per

cent shall attach for such delinquency and the Board of Commissioners shall institute proceedings in the Chancery Court for said county to enforce the collection of said delinquency, and said court shall give judgment against said lands and the real property for the amount of such taxes and said penalty of twenty-five per cent and the interest on the same for the expiration of the time for the payment of same to the collector at the rate of six per cent per annum and for all cost of said proceedings. Such judgment shall provide for the sale of said delinquent lands for cash by a commissioner of the court after advertisement, as hereinafter set forth. Said proceedings and judgment shall be in the nature of a proceeding in rem, and it shall be immaterial that the ownership of said lands be incorrectly alleged in said proceedings, and said judgment shall be enforced wholly against the lands and not against any other property of said defendant. All or any part of said delinquent lands or real property within the district may be included in one suit instituted for the collection of said delinquent taxes, penalty and cost, as aforesaid, and notice of the pendency of each suit shall be given by publication weekly for two consecutive weeks before judgment is entered for the sale of said lands in some newspaper in said county having a general circulation therein. Said notice may be in the following form: The complaint above referred to need not allege minor de-

tails of organization of the district or the manner of making or levying the assessments or benefits, but may allege generally the organization of said district and that the taxes sought to be foreclosed is past due and unpaid (C. & M. Dig. 5437).

Section 26. At the first regular or adjourned term of the Chancery Court after said notice shall have been published for three consecutive weeks and not earlier than five days after the last insertion of said notice such suit shall stand for trial, unless a continuance is granted to a delinquent for some good cause shown, in the discretion of the Court, and such continuance shall not affect the Court's duty to proceed with the delinquents as to whom no continuance was granted, and in all cases where said notice has been published as aforesaid, and no answer filed, or where answer is filed and the cause decided for the plaintiff, the Chancery Court by its decree shall grant the relief prayed for in the complaint, and shall tax as part of the cost a reasonable attorney's fee for the plaintiff, and shall direct said commissioner to sell the land described in the complaint at the front door of the county court house to the highest and best bidder for cash in hand, after having first advertised such sale (such advertisement shall include all lands embraced in said decree) for two weeks consecutively in some newspaper published

in said county, and if all lands be not sold on the day as advertised, such sale shall be continued from day to day until completed, and said commissioner shall by proper deed convey to the purchaser as against all others whomsoever, saving to infants and insane persons having no guardian and curators, the rights they now have by law to appear and except to such proceedings within twelve months after their disabilities. The commissioner conducting such sale shall be allowed a reasonable fee, to be fixed by Chancery Court, which shall be taxed as cost in the case. The commissioner shall keep an accurate list of all lands sold, and shall account to the Board of Commissioners for all money derived from the sale of delinquent lands (C. & M. Dig. 5438).

Section 27. Said suit shall be conducted in the name of the road improvement district and in accordance with the practice and procedure of the Chancery Court of this state, except as herein otherwise provided; but neither attorneys ad litem, nor guardians ad litem, nor any other provisions of Section 7694 be required, and said suit may be disposed of on oral testimony as in ordinary suits at law, and this Act shall be liberally construed to give to said assessment and tax list the effect of bona fide mortgages for a valuable consideration, and a first lien upon said lands and real property as against all persons, firms

or corporations having an interest therein; provided, that no informality or irregularity in holding any meeting provided for herein or in any description, valuation or assessment of the property, or in the name of the owner, number of acres or manner of assessment shall be valid defense to such action (C. & M. Dig. 5439).

Appeals Affect Land of Appellant Only.

Section 39. No appeal shall delay the proceeding for carrying out the improvement herein contemplated, and when an appeal is taken said appeal shall only affect the particular land or other real property owned by the person appealing, and if upon the determination of said appeal the party so appealing shall be unsuccessful, then all court cost and necessary expenses of said appeal shall be paid by him (C. & M. Dig. 5461).

No. [redacted]141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit, in Nos. 5454 and 5470.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 2 OF LAFAYETTE COUNTY, ARKANSAS, PETITIONERS,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

REPLY BRIEF FOR PETITIONERS.

HENRY MOORE, JR.,
Attorney for Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas.

No. 552.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

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COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 2 OF LAFAYETTE COUNTY, ARKANSAS, PETITIONERS,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

BRIEF.

We wish to direct the attention of the court to certain issues raised in the respondent's brief as follows:

A trial should be had to determine the benefit received by respondent.

In the original brief we have printed Section 1246 (Jud. Code, Section 269, as amended, Act Feb. 26, 1919, c 48) to the effect that on the hearing of any appeal the court, upon an examination of the entire record, shall give judgment without regard to technical errors or defects, which do not affect the rights of the parties.

The Circuit Court of Appeals found that the trial court was mistaken when it said there was no disputed question of fact in the case and found that the real question for decision was as to the amount of benefits to be assessed against the railroad company, but did not reverse the case for this error since the District Court on its own motion withdrew the cause from the consideration of the jury without objection being made by either the plaintiff or defendant.

Section 914 of the Revised Statutes is as follows:

> "*Practice and proceedings in other than equity and admiralty causes.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

It has been definitely decided by the Supreme Court of Arkansas that a tax payer is not entitled to a trial by jury on the question of assessments levied for an improvement district.

"It is contended in the first place that the court erred in refusing to grant a trial of the cause before a jury. That question has been determined contrary to the contention of counsel in the recent case of *Drew County Timber Co.* v. *Board of Equalization*, 124 Ark. 569, where we held that the right of trial by jury, 'is confined to cases which at common law were triable before the adoption of the constitution,' and that a tax payer aggrieved by the action of the county board of equalization may appeal to the County Court and thence to the Circuit court, but has no right to trial by jury."

Mo. Pac. Railroad Co. v. *Conway Bridge Dist.*, 134 Ark. p. 298.

As both the counsel for plaintiff and defendant were of the opinion that the decision of the Arkansas Court must be followed by the Federal District Court, since this is not a proceeding in equity, it was believed and still appears to counsel to be the law, that the U. S. District Court in its discretion could hear this cause without the aid of a jury, and therefore no objection was made by either side, when the court on its own motion withdrew the case from the jury.

Since it is found that the District Court was in error in holding there was no disputed question of fact and since the Court of Appeals under said Section 1246 is required to give judgment without regard to technical errors or defects, this cause should be reversed, so there may be a decision upon the question of fact as to the amount of benefits received by the respondent, railway company, from the building of said road.

No discrimination was made against respondent.

Respondent refers on page 34 of its brief to the case recently decided by this court, *The Kansas City Southern Railroad v. Road District No. 6*, decided June 6th, 1921, and reported in 65 Law Edition, p. 16.

Said respondent cites the facts of that case and of the present case as showing alleged discrimination in the assessment against the St. Louis Southwestern Railway Co.

The Kansas City Southern Railway Co., appellant in the case above referred to, and the respondent, St. Louis Southwestern Railway Co., are both through trunk lines, and are assessed by the tax commission of Arkansas at approximately the same sum per mile. In the Kansas City Southern Railway case, the benefit on account of the proposed road was levied at the rate of $7,000.00 per mile of main track. In the instant case, said benefit levied is $2,000.00 per mile of main track.

The District Court held that only the naked land of the railway company could be assessed for road purposes, and said court placed an assessment of $54.00 per mile against the railroad in the country and $2400.00 per mile against the same road in the incorporated towns. Transcript, page 233.

The assessors had classified the three classes of property for road purposes as rural land, urban property and railroad track; and the right to make such a classification, if reasonable, has been upheld in innumerable cases, particularly the Kansas City Southern Railroad Case above

referred to, which cites *Royster Guano Co. against Virginia*, 253 U. S. p. 412.

Said Kansas City Southern Case upholds the right to assess according to value, position, acreage or the front foot rule. For the information of this court below find a tabulated statement of the various classes of property within the road district.

Rural Lands.

County and State Assessment	$364,080.25
Benefits assessed for road	212,103.00
Percentage	58.25%

Urban Lands.

County and State Assessment	$383,270.00
Benefits assessed for road	54,490.00
Percentage	15%

Louisiana & Arkansas Ry. Co.

County and State Assessment	$119,350.00
Benefits assessed for road	20,080.00
Percentage	16.75%

St. Louis Southwestern Ry. Co.
(Cotton Belt)

County and State Assessment	$581,960.00
Benefits assessed for road	49,606.50
Percentage	8.50%

Transcript, page 192.

Said assessments were accepted by every single property owner and by the Louisiana & Arkansas Railroad Co. The single exception being that of the respondent.

Should the assessment of benefits be made according to value instead of using the classification as above set forth, the respondent's assessment would be more than doubled. Should the reduction in assessment as allowed by the U. S. District Court stand, the respondent, would pay only on the basis of 1-3 4% of its assessed valuation. The above percentage shows how absurd is the contention of the respondent that it has been discriminated against.

Decision of state court is final in the construction of its constitution and statutes.

At page 6 of its brief the respondent states "It would seem strange indeed, if the question of the right to remove could be concluded and determined by the decision of the State Court.

The United States Courts are necessarily tribunals to determine matters of this kind."

Until a decision was rendered by the Supreme Court of Arkansas construing the powers of the County Court under the Arkansas Constitution, the Federal Courts could determine for themselves what such powers might be, however, since prior to the decision in this cause the Arkansas Supreme Court has settled definitely the question at issue, holding that the County Court acts in matters of local assessments in an administrative and not in a judicial capacity, such decision of the highest court of the state constructing its own constitution and statutes is binding upon this court.

As stated in a recent case referring to a decision in reference to the Missouri State law "So far as the judgment of the Supreme Court of Missouri turns upon matters of state law, it is conclusive." *Mount St. Mary's Cemetery Association* v. *Mullins*, 248 U. S., page 501, 63 Law Edition, page 386.

For complete discussion as to the duty of the U. S. Courts to follow the decisions of State Courts in reference to the state constitution and statutes, see cases cited in the *U. S. Ex Rel. Pierce* v. *Cargile*, 258 Federal, page 458.

In the case at issue the county court acted in an administrative capacity.

At page 22 of respondent's brief he states that the quotations at pp. 22 & 23 of petition for writ of certiorari are misleading in that the section of the present Constitution of Arkansas granting jurisdiction is omitted and the provision of the Constitution of 1868 substituted, which error respondent states has been corrected in petitioner's second brief, p. 20.

In order that the court may not be mislead, and to be perfectly fair, we below print the sections in question from both the constitution of 1874 (the present Constitution of Arkansas), and also the Constitution of 1868, with sections of the act of the legislature, which were made binding on the County Court under Section 22 of the schedule of the present constitution.

Citation from the constitution of Arkansas of 1874.

"County Courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, and the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvements and local concerns of the respective counties."

Section 28, Article 7.

"The judge of the County Court shall be the judge of Probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons of unsound mind and their estates as is now vested in the Circuit Court, or may be hereafter prescribed by law. The regular terms of the Court of Probate shall be held at the times that may hereafter be prescribed by law."

Section 34, Article 7.

"The County Courts provided for in this constitution shall be regarded in law as a continuance of the board of supervisors now existing by law."

Section 23 of the Schedule of the Constitution of the State of Arkansas.

Constitution of 1868.

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, and the Supreme Court, Circuit Courts, and such other courts inferior to the Supreme Court as the general assembly may from time to time establish."

Section 1, Article 7.

The board of supervisors, under the Constitution of 1868, of which the present County Court is a continuance in accordance with Section 23 of the Schedule of the present Constitution of Arkansas was constituted and exercised the administrative functions as shown by the following quotations from Gantt's Digest of the Rev. Statutes of Arkansas. The law in question having been passed April 3rd, 1873, and being the one referred to under Section 23 of the Schedule of the present constitution above quoted. The following sections are from Gantt's Digest published by authority of the State of Arkansas in the year, 1874.

> Sec. 575. A board of supervisors, to consist of three members, is hereby established in each county.
>
> Sec. 585. A majority of the board shall constitute a quorum for the transaction of business.
>
> Sec. 587. In case a quorum shall not attend on the first day of any regular or special session of said board, the sheriff shall adjourn the same until the next succeeding day; and if, at twelve o'clock M. on the second day, no quorum shall be present, the sheriff shall adjourn the board until the day fixed by law for its next regular session.
>
> Sec. 590. The president of the board may call a special session thereof whenever, in his judgment it may be necessary, upon his giving five days' notice of said session, by advertisement posted at the door of the court house of his county, and causing a copy thereof to be delivered to or left at the residence of each member of said board.
>
> Sec. 591. The county clerk shall, by virtue of his office, be clerk of the board of supervisors for his county.

Sec. 593. The seal prescribed by law to be kept and used by County Courts shall be the seal of the board of supervisors, and shall be used by the clerk thereof for the authentication of any record, process, or proceeding heretofore required by law to authenticated by the seal of the county: *Provided*, that each board may procure a seal, to be styled the seal of ..... County.

Jurisdiction.

Sec. 595. Such board shall have and exercise the following powers and jurisdiction:

First. In all matters relating to county taxes, equalization of assessments on all real and personal property, appropriation of money for county purposes, and in any other case that may be necessary for internal improvement and local concerns of the county.

Second. To appoint viewers, reviewers, and overseers of the roads, and designate justices of the peace to apportion hands to work on roads.

Third. To order the erection of bridges and direct the repairing of same.

Fourth. The superintendence of all paupers.

Fifth. To grant peddlers' grocery, ferry and other licenses provided for by law.

Sixth. To audit, settle, and direct the payment of all just demands against the county.

Seventh To have control and management of the property, real and personal belonging to the county.

Eighth. To have full power and authority to purchase or receive, by donation any real or personal property for the use of the county, and to cause to be erected all buildings necessary for the use of the county.

Ninth: To sell and cause to be conveyed any real estate or personal property belonging to the county, and appropriate the proceeds of such sale for the use of the same.

Tenth. To contract for the erection of toll and other bridges and causeways.

Eleventh. To have and exercise such other powers and jurisdiction as is now vested by law in the County Courts of the several counties.

Sec. 596. The board shall possess all the powers and is authorized and required to perform all such acts and duties, not in conflict with the provisions of this act, as were heretofore required to be done and performed by County Courts.

Sec. 597. The board of supervisors, for an interruption of their proceedings, or any contempt offered them while in session, shall have power to impose a fine not exceeding fifty dollars, and to imprison the offender for each offence, not exceeding twenty-four hours.

Sec. 598. Said board of supervisors shall constitute the county board of equalization, and shall perform all duties required to be performed by said board of equalization in the manner and at the time now provided by law.

Section 599. The president of the board of supervisors shall have power, in vacation, to approve any bond requiring the approval of the board by law, which bond, so approved by the president, shall be submitted to the board at its next regular meeting for their approval or rejection, and if rejected a new bond and surety shall be given.

From the above it will be noted that the County Court at this time as constituted had three members instead of one as at present, being the same number of

members as constituted the County Court of West Virginia when the Upshure case was heard. The present constitution changed the number from three to one and calls this one, not a supervisor, but County Judge, however, in accordance with Section 23 of the present constitution, the County Court as now provided for, is in law a continuance of the board of supervisors formerly existing under the Constitution of 1868.

The Supreme Court of Arkansas has decided in the case of *M. P. Railroad Co.* v. *Izard County Highway Imp. Dist.*, 143 Ark., p. 261, that the County Court in passing upon the question of the amount of legal assessments for improvement districts is acting in an administrative capacity, and it is our contention that the present County Court and the former board of supervisors, and also the County Court of West Virginia, as detailed in the Upshure case, are bodies of like powers and authority, and we believe the decision of the Arkansas Court is fully sustained by this Honorable Court in said Upshure case.

For the reasons set forth in petitioner's original brief, which are confirmed by excerpts and citations in this reply brief, this cause should be reversed and remanded to the County Court of La Fayette County, Arkansas.

Respectfully submitted,

Commissioners Road District, No. 2,
La Fayette County, Arkansas,
Petitioners,

By HENRY MOORE, JR.,
Attorney.

INDEX.

Cases Cited.

Constitution and Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 OF LAFAYETTE COUNTY, ARKANSAS,
Petitioners,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF ON MOTION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The following statement of the facts is that made by the Circuit Court of Appeals, 256 Fed. 524, with the exception of the two sentences enclosed within brackets which were inserted by us:

> "This is a suit brought by the Commissioners of Road Improvement District No. 2 of Lafayette

County, Arkansas, hereafter called plaintiffs, against the St. Louis Southwestern Railway Company, hereafter called defendants, to recover the sum of $49,765.80, being the amount assessed as benefits by the Board of Assessors of said district against the real estate, buildings and roadbed of defendant situated therein. The proceeding out of which this suit originated was commenced by the organization of the district under what is known as "the Alexander Road Law" of Arkansas. [Upon its organization, the district under the terms of the act became 'a body politic and corporate' and might 'sue and be sued, plead and be impleaded' and 'have perpetual succession,' etc.] After the organization of the district the County Court appointed three persons to act as commissioners. These commissioners formulated plans, ascertained the cost of the improvement, and filed the same in the office of the County Clerk. Thereupon the County Court appointed three persons to act as a board of assessors for said district [whose duty it became to assess the benefits accruing to and damages suffered by property in the district by reason of the improvement]. The persons appointed as assessors met at a time designated by the president of the Board of Commissioners and assessed the benefits which in the judgment of said board would be received by the defendant by reason of the improvement contemplated, as if would affect the lands and other property of defendant in said district. This assessment amounted to the sum sued for in this suit as above stated, and the same was duly certified by said Board of Assessors to

the Board of Commissioners. The commissioners certified and filed the same in the office of the County Clerk. The County Clerk gave public notice as provided by law and therein stated that said assessment of benefits had been filed in his office and that any person, firm or corporation aggrieved by reason of any assessment therein made should appear before the County Court on a date to be fixed by the court for the purpose of having any errors adjusted or any wrongful or grievous assessment corrected, and that all grievances or objections to said assessments should be presented to said court in writing. On the 22nd day of May, 1918, the County Court of Lafayette County, Arkansas, fixed June 28, 1918, as the date for hearing all exceptions of persons, firms or corporations to the assessment of benefits as made by the Board of Assessors of said district. On June 27th, the day before the hearing fixed by the County Court, the defendant duly removed the case against it to the United States District Court for the Western District of Arkansas, on the ground of diversity of citizenship. A motion to remand the case to the County Court was made in the court below by the plaintiffs on the ground that the proceeding was not a suit. The motion was denied. This ruling and the reduction of the amount of benefits are assigned as errors by the plaintiffs. The defendant assigns as error the refusal of the court below to further reduce the amount of benefits. After the motion to remand was denied the case subsequently was brought to trial upon the assessment of the Board

of Assessors as certified to the County Court by the Board of Commissioners, the amended exceptions of the defendant to said assessment, and the reply to said exceptions by the plaintiff.

"The defendant alleged, among other things, that the assessment was excessive and exorbitant and greatly and substantially exceeded the benefits which would be received by defendant's property by reason of the construction of the contemplated improvement; that said assessment was arbitrary and discriminatory as compared with the assessment made by the Board of Assessors upon other property within the district; that the maximum benefits which the property of defendant would receive by reason of the construction of the contemplated improvement would not exceed $3,009.21, and that to the extent that the assessment of $49,765.80, exceeded said sum of $3,009.21, the assessment was unreasonable and arbitrary and would deprive the defendant of its property without due process of law. The trial was commenced before the District Court and a jury duly impaneled, but subsequently the Court, of its own motion, withdrew the cause from the consideration of the jury for the alleged reason that there was no disputed question of fact, whereupon the plaintiffs and the defendant making no objection to the action of the Court in withdrawing the case from the jury each asked the Court to make certain findings of fact and conclusions of law which are set forth in the record. The Court did not adopt the findings of either party, but made findings of fact and conclusions of law of its own, and entered a judgment thereon against the defendant in the sum of $10,485.48."

The Court of Appeals, in affirming the judgment of the District Court, held:

(1) That the making of the assessment of benefits and damages by the Board of Assessors and the certification thereto by the Board of Commissioners were *ex parte* proceedings by administrative officers, but that the filing of the assessment list in the County Court by the Road District was, in effect, the filing of a complaint; the warning order which was issued against the defendant and others, upon order of that Court, process; and that the proceeding, therefore, became a suit *inter partes* between the district and the railroad, prosecuted in a "Superior Court of Record" invested with jurisdiction thereof by the State Constitution, and that the controversy was, therefore, a removable suit.

(2) That the parties had, by their actions, waived a jury in the Federal District Court without complying with Section 649, U. S. R. S., and that, therefore, the Appellate Courts were without jurisdiction to review questions other than those arising upon the process, pleadings, or judgment, of which there were none.

BRIEF.

The petition for the writ of *certiorari* is (pp. 16 and 17) predicated upon four reasons or grounds. The first, second and third of these grounds relate to petitioner's first assignment of error and will be considered together.

The first reason alleged is "That the Circuit Court of Appeals declined to follow Upshur County v. Rich, 135 U. S. 467, 34 L. ed. 198"; the second and third, that there is great uncertainty as to the jurisdiction of the Federal Courts in cases of this kind due to the fact that subsequent to the decision in this case the State Supreme Court, in Railway Co. v. Izzard County, 220 S. W. 452, upon the alleged authority of the *Upshur case*, *supra*, held that a case of this kind was not removable.

It is obvious that if the decision of the Court of Appeals in this case did follow the *Upshur case*, *supra*, any "uncertainty" as to the Federal Courts' jurisdiction is due to the State Court's misapprehension of the decision in the *Upshur case*, and would be finally and most expeditiously dispelled by the denial of the petition.

It therefore becomes necessary to inquire (1) as to the principles laid down in the *Upshur case*, and (2) their application to the facts in the case at bar.

The principles laid down in that case are thus stated by the Court at page 476:

> "The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal, in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other. * * *"

Those principles are so clearly stated that there should be no great difficulty in comparing their application by the Supreme Court to the facts in the *Upshur case* with the application of the same principles made by the Court of Appeals to the facts in this case, having regard to the two considerations which the Supreme Court held to be determinative, to wit: (1) Was there a judicial issue between the parties? and (2) Was it pending in a judicial tribunal?

In the *Upshur case* the proceeding was initiated by

an *ex parte* petition of a taxpayer addressed to the administrative board of the county, praying that the assessed value of his property as returned by the County Assessor be reduced. The issue was the valuation of the property for taxation.

The proceeding in the case at bar was initiated in a constitutional court of the State, vested, as we shall hereafter see, with judicial as well as administrative powers, by the filing of an appraisement of the amount of damages and benefits caused by the public improvement and praying (by necessary implication) that the same be found to be correct, and declared a paramount lien upon defendant's property, upon which complaint process was issued, a trial between the road district upon the one hand and the property owners, separately had, and a "judgment" rendered which was "final, binding and conclusive, and subject only to direct attack upon appeal", which judgment was to "be a first lien" upon defendant's property. There can be no doubt, therefore, that such a controversy was *inter partes*.

That an issue of the amount of damages suffered and benefits received from the construction of a public improvement is a juridical one, involving questions of both law and fact, would seem to be so self-evident that the citation of authority would be superfluous, yet, in view of the fact that the State Court's decision

in Railway v. Izzard County, *supra*, is predicated almost entirely upon the contrary opinion, we feel it proper to burden the Court with the following authorities:

The proceeding involved in the case of Union Pacific Railroad Company v. Kansas City (Pacific Railroad Removal Cases), 115 U. S. 1, 29 L. ed. 319, was one to widen and improve a city street. The initial assessment of benefits and damages was made by the Mayor and a jury—a preliminary inquest by the officers of the municipal corporation in all respects similar to the assessment in the case at bar by the Board of Assessors. From the initial proceeding the railroad appealed to the Circuit Court of the State from which it removed the case to the Federal Court. The issues and their determination are thus stated by the Supreme Court:

> "What, then, is the relation in which the Railway Company, as an appellant, stands towards the City of Kansas in this litigation? Clearly, it has two distinct issues, or grounds, of controversy: first, the value of its property taken for the street; secondly, the amount of benefit which the widening of the street will create to its remaining property not so taken; * * * third, the right of the city to open a street at all across its depot grounds. Now, this controversy involving these three issues is a distinct controversy between the company and the city. * * * 'This controversy is to all intents and purposes a suit.'

The indirect effect upon the general proceedings for widening the street which would ensue in case the Federal Court should determine that the City of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its property was much too small, or the assessment for benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the Act of March 3, 1875." * * *

The same rule is stated and applied in the following cases:

Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206;
Searl v. School District, 124 U. S. 197, 31 L. ed. 415;
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. ed. 462;
Smith v. Douglas County, 254 Fed. 244;
Jarnecke Ditch, 69 Fed. 161;
Re Stutsman County, 88 Fed. 337;
Terre Haute v. R. R. Co., 106 Fed. 545;
Drainage District No. 19 v. Ry. Co., 198 Fed. 253;
Re Mississippi Power Co., 241 Fed. 194;
C. M. & St. P. Ry. Co. v. District No. 8, 253 Fed. 491.

We rely upon these authorities to establish conclusively the principle that the issue before the County

Court was a juridical one *inter partes* and that if that tribunal were a court having judicial powers to determine questions of law and fact then this case is controlled by the decision of this Court in the *Pacific Removal cases, supra.*

In the *Upshur case* the Court stated that the Constitution of West Virginia of 1872 conferred judicial powers upon the county courts, but that by an amendment in 1880 its judicial powers were withdrawn except in matters of probate. By the same amendment it was provided that the "county courts should be composed of three commissioners", upon whom was conferred "*jurisdiction*" in matters of probate, but "*superintendence* and *administration* in internal police, etc.," and the Legislature was authorized to confer other powers upon it "not of a judicial nature". The order which could be made by the "county court" of West Virginia was not one from which an appeal would lie to the courts constituting the judicial system of the State, but was an administrative order reviewable by the courts only by collateral attack.

Low v. County Court, 27 W. Va. 785.

Under these circumstances the Supreme Court held that the so-called "county court" was a court in matters of probate alone and that in all other matters "it was an administrative board charged with the management of the county affairs".

That the situation in the instant case is wholly different is shown by the Constitution of the State. In this connection we regret that we are compelled to point out that the quotations from the State Constitution set out at pages 8 and 9 of the petition for writ of *certiorari*, and at pages 22 and 23 of the brief thereon, are unintentionally misleading, in that the sections of the *present constitution* granting jurisdiction are omitted and the provisions of the former Constitution of 1868 substituted. This fact renders a more extensive quotation from the present Constitution than would otherwise be necessary.

Section 1 of Article VII of the present Constitution of the State reads as follows:

> "The judicial power of the State shall be vested in one Supreme Court, in Circuit Courts, in *County* and Probate Courts and in Justices of the Peace."

Section 28 of Article VII provides:

> "County Courts shall have exclusive original *jurisdiction* in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, and the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvements and local concerns of the respective counties."

In the case of Pierce v. Edington, 38 Ark. 150, it was held:

> "The County Court is a superior court of record in the sense that within the scope of the subject matters over which it has jurisdiction and in the absence of a showing to the contrary, it will be presumed that it has acted upon facts sufficient to maintain its action."

In the case of Board of Directors of St. Francis Levee District v. Redditt, 79 Ark. 154, an act of the Legislature conferred upon the County Court original jurisdiction in a proceeding for the assessment of damages caused by the construction of a levee by a municipal corporation. It was contended upon behalf of the landowners in the case cited that this act was unconstitutional. The Court in passing upon this question said:

> "The Constitution vests in the County Court exclusive original jurisdiction in all matters concerning county taxes, roads, bridges, etc., and then this additional jurisdiction: 'And in every other case that may be necessary to the internal improvement and local concerns of the respective counties' (Const. 1874, Art. VII, Sec. 28). Public levees to reclaim overflowed and swamp lands and retrain inundation from the mighty rivers within this State and bordering it are the best types of internal improvement and are indisputably within the contemplation of this clause of the

Constitution. Therefore it follows that the jurisdiction conferred on the County Court in these matters is within the constitutional jurisdiction of that court, and the statutes are not for that reason void."

It is to be noted that the construction of an improved highway by a municipal corporation is exactly the same type of internal improvement as the construction of a levee by another municipal corporation.

Section 33 of Article VII reads:

> "Appeals from all judgments of County Courts or Courts of Common Pleas, when established, may be taken to the Circuit Court under such restrictions and regulations as may be prescribed by law."

Section 1533 of Kirby & Castle's Digest of the Arkansas statutes provides that "appeals shall be granted as a matter of right to the Circuit Court from all final orders and judgments of the County Court" * * *.

Section 1430 of same digest declares that upon such appeal the Circuit Court "shall have the jurisdiction of the subject matter to the same extent as though original jurisdiction had been conferred upon the Circuit Court by law".

It would seem to follow as corollary of this act that the jurisdiction of the County Court over the

matter is precisely the same as the jurisdiction that the Circuit Court would have upon appeal. It cannot be gainsaid, under the authorities cited, that this proceeding when it reaches the Circuit Court, which is unquestionably a court and not an administrative board, would become a removable suit. Since under the Constitution and the statutes the County Court has precisely the same jurisdiction as the Circuit Court and since, indeed, it may be stated that the Circuit Court has no jurisdiction except that which the County Court has. It follows that the case must be a suit when it reaches the County Court.

We have already called attention to the fact that the order of the County Court made in this proceeding is: "A final judgment, conclusive, binding and incontestable except by direct attack upon appeal" (Section 14 of the Act, K. & C. Digest 9119), and is under Section 27 of the Act, "a first lien upon said lands and real property as against all persons, firms or corporations having an interest therein" (K. & C. Digest 9139).

As was said by the Court in the *Statsman case, supra*, "it is difficult to appreciate the force of that reasoning which attaches to a proceeding in a court, as to its effect upon the rights of the parties, all the consequences of a suit, but for the purpose of determining the jurisdiction of the Federal Courts hold the same proceeding to be purely administrative."

It follows that the County Court of Arkansas constitutes a part of the judicial establishment of the State as ordained by its Constitution, and, although charged with some duties of an administrative character, is a judicial tribunal and a court of record.

The facts in the case of Madisonville Traction Co. v. St. Bernard Mining Company, 196 U. S. 239, 49 L. ed. 462, are closely analogous, in so far as the character of the court is concerned. That was a condemnation proceeding for the assessment of damages filed in the County Court of Kentucky. The Court found that under the Kentucky Constitution the County Court had judicial, as well as administrative, powers and that the proceeding was one calling for the exercise of the former and the suit removable.

The case cited also disposes of the point made in petitioners' brief that the assessment suit by the petitioners could not have been filed in the District Court in the first instance. Under Section 14 of the Alexander Road Law (K. & C. Digest 9119) the proceedings as to each tract of land are separate, distinct and severable. There is no reason, therefore, why the suit, in so far as petitioners' land is concerned, could not have been filed in the District Court. Even if it could not have been because of the *peculiar procedure* established by the State Court, it would nevertheless have been removable.

The precise question was decided favorably to our contention in the Stuttsman case, *supra*, where the Court said:

> "It has been held in several decisions that a case cannot be removed into the Federal Court unless it could originally have begun there. * * * An examination of these decisions, however, will show that the limitation mentioned is based, not upon matters of procedure, but upon those elements specified as essential to jurisdiction in the first section of the Act of 1887-88. To confer original jurisdiction, the following facts, and no others, are necessary: (1) A suit of a civil nature at common law or in equity. (2) It must involve at least $2,000.00, exclusive of interest and cost. (3) It must arise wholly between citizens of different states, or present one of the other conditions mentioned in the last part of the first section. A proceeding which presents these elements is within the original jurisdiction of Federal Courts, notwithstanding it may involve matters of procedure which would prevent its commencement in those courts. The section defining the right of removal makes no reference to suits which might have been begun in the Federal courts, and the phrase, 'of which the Circuit Courts are given jurisdiction by the preceding section,' ought not to be considered as requiring elements not mentioned in the preceding section. The jurisdiction of the Federal Courts cannot be made to depend upon formal or modal matters; otherwise it would be in the power of the states

to defeat that jurisdiction entirely by hostile legislation hedging about the commencement of suits by a statutory procedure, which could not be employed in the Federal Courts."

We submit that the proceeding initiated by the filing of the assessment lists by the district was (1) one requiring the determination of juridical rights and was an adversary judicial proceeding, and (2) that it was instituted in a constitutional court of the State empowered to hear and determine such rights. The conclusion follows under the authorities cited, including the *Upshur case*, that the proceeding was a "removable suit".

If we interpret the petitioner's second assignment of error correctly, it is grounded upon the misapprehension that the recent act of Congress cited [Act Feb. 26, 1919, c. 48] (*the obvious primary purpose of which was to prevent the reversal of cases on technical grounds*) relieves a litigant of the duty to object or except to any action of the trial court in order to make that action a ground for a writ of error, and imposes upon the Appellate Court the duty to explore the entire transcript of the proceedings below in every case for the purpose of discovering errors committed by the trial court, which were not brought to the attention of the latter court by such litigant, nor made a part of the record by exception.

Thus, in this case, is it asserted that it was the duty of the Circuit Court of Appeals to reverse the case for a new trial because the trial court withdrew the same from the consideration of the jury, although petitioner not only made no objection and saved no exception to such action in the trial court, but moved that Court to make certain findings of fact and declarations of law. The statement of this contention, in the light of the statute cited, is its own answer.

Respectfully submitted,

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